NO. 80-1604

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SPOKANE ARCADES, INC., A Washington Corp., PLAYTIME THEATRES, INC., A Washington Corp., J-R DISTRIBUTORS, INC., a Washington Corp., and SPORTLAND AMUSEMENT, INC., a Washington Corp.,
Plaintiff-Appellees

v.

DONALD C. BROCKETT, Prosecuting Attorney, in his representative capacity only,
Defendant-Appellant

and

THE HONORABLE DIXIE LEE RAY, as Governor of the State of Washington in her representative capacity only, HONORABLE BRUCE K. CHAPMAN, Secretary of State of Washington, in his representative capacity only, HONORABLE SLADE GORTON, as Attorney General of the State of Washington in his representative capacity only
Defendants.

On Appeal from the
Ninth Circuit Court of Appeals

JURISDICTIONAL STATEMENT

DONALD C. BROCKETT
Spokane County Prosecuting Atty.
Spokane, Washington 99260
(509) 456-3662

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QUESTIONS PRESENTED

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED VANCE v. UNIVERSAL AMUSEMENT CO., INC., 63 L.Ed.2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL "FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION"?

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Washington, Northern Division, is reported at 449 F.Supp. 1145, (Appendix, 1a-37a). The opinion of the Ninth Circuit Court of Appeals is reported at 631 F2d 135, (Appendix, 38a-47a).

JURISDICTION

Appellant appeals from the judgment of the Ninth Circuit Court of Appeals entered October 23, 1980, rehearing denied December 16, 1980, (Appendix, 65a-66a) which affirmed the judgment of the United States District Court for the Eastern Division of Washington, Northern Division, holding that the Washington Statute, Revised Code of Washington, 7.48.050-100, 900 was unconstitutional.

Notice of appeal was given February 5, 1981, (Appendix, 67a-68a). This Court has jurisdiction under 28 USC § 1254(2).

STATUTORY PROVISIONS INVOLVED

The statute involved is Revised Code of Washington 7.48.050-100, 900, (Appendix, 48a-64a).

STATEMENT OF THE CASE

The statute involved in this case was approved by the people of the State of Washington as an Initiative on November 8, 1977. Before the statute was even certified by the Secretary of State,

the respondents, corporations engaged in the exhibition, sale or distribution of motion picture films, books and magazines in Washington, petitioned the United States District Court for the Eastern District of Washington, Northern Division, for a Declaratory Judgment that the statute was unconstitutional on its face as a prior restraint in violation of the First Amendment to the United States Constitution.

Appellant argued that the Federal Court should abstain by virtue of the fact that there had been no actual case or controversy before any state court in order that the statute be authoritatively construed. The District Court Judge, the Honorable James M. FitzGerald, overruled this argument and held that the issue of the constitutionality of the statute could be reached.

Appellant argued that the statute provided a legitimate method to effectively determine obscenity to be a nuisance after a full hearing before a court and provided remedies to abate the nuisance. The District Court overruled this argument and held that the statute amounted to a prior restraint prohibited under the First Amendment to the United States Constitution and thus was unconstitutional.

Appellant argued that the civil procedure, similar to that of the State of Ohio, had been upheld and approved by this Court when the case of Art Theatre Guild, Inc., et al v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), was dismissed "for want of a substantial Federal question." The District Court

overruled this argument and held that the procedures were not similar.

Notice of appeal was given by appellant to the Ninth Circuit Court of Appeals on May 19, 1978. The Ninth Circuit Court of Appeals affirmed the District Court in an opinion filed October 23, 1980. A Petition for Rehearing was denied on December 16, 1980.

STATEMENT OF REASONS FOR PLENARY REVIEW

I.

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

If the statute had been certified by the Secretary of State and an action had been brought in the Washington State Courts, it is clear that the court would have been forced to abstain. Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). That this is the most appropriate way for state statutes to be considered in our federal system was recognized in Younger, supra, at 401 U.S. 52, when the Court stated that the duty of the federal judiciary:

> . . .does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. . . .

In addition, the Court has recognized under the Pullman type of abstention that there is:

> . . .the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Comm'n v. Pullman Co., 312 US 496, 85 L.Ed. 971, 61 S.Ct. 643 (1941). See Bellotti v. Baird, 428 US 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976).

Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 477, 52 L.Ed.2d 513, 97 S.Ct. 1898 (1977); Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976) rehearing denied 426 U.S. 912, 48 L.Ed.2d 839, 96 S.Ct. 2239.

This Court has recently reminded us that:

> . . .the Federal Court should not exert jurisdiction if the plaintiffs 'had an opportunity to present their federal claims in the state proceedings. Juidice v. Vail, 430 U.S. 327, 337 (1977) (Emphasis in original). . . .'

Moore v. Sims, 442 U.S. 415, 425 , 60 L.Ed.2d 994, 99 Sup. Ct. 2371 (1979).

Also that in Moore v. Sims, supra, 442 U.S. 427:

> . . .The breadth of a challenge to a complex State statutory scheme has traditionally militated in favor of abstention, not against it. . . . (Emphasis in original).

Furthermore, it is questionable whether the District Court had jurisdiction to hear the case, for as said in U.S. v. Thirty-seven Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 91 S.Ct. 1400:

> . . .we lack jurisdiction authoritatively to construe State Legislation.

Because the Respondents had an opportunity to present their issues to the state courts in which event many of the procedures would have been authoritatively construed, perhaps avoiding the necessity of a federal constitutional adjudication, the court should have abstained. Bellotti v. Baird, 428 U.S. 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976); Juidice v. Vail, supra.

This Court has spoken even more definitively in Allen v. McCurry, et al., _____ U.S. _____, 66 L.Ed.2d 308, 319, _____ S.Ct. _____ (1980), wherein it is said:

> The actual basis of the Court of Appeals' holding appears to be a generally

> framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself.

Nowhere in 28 USC § 1331(a), 28 USC § 1343(3), or 28 USC §§ 2201, 2202, is such authority to be found either. In fact, the Court insisted that to have federal jurisdiction there had to be three circumstances:

> . . . where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176. (Emphasis supplied).

66 L.Ed.2d 317.

There was absolutely no showing

that Washington courts could or would not construe and apply federal constitutional principles to the statute. Nor was there any showing that the Washington trial court might have made any of the ridiculous applications respondents suggest as justification that the statute was unconstitutional.

It is ironic that the Ninth Circuit Court of Appeals in this case indicated that abstention was inappropriate and yet in discussing the issue of severability stated:

> That the statute contains a severability clause, Wash. Rev. Code §7.48.900, does not authorize us to indulge in major revisions to salvage the statute. Id. at 833-834. We are certain that the Legislature of the State of Washington can do this better than we. (Emphasis added, Appendix [redacted], page [redacted]).

It is respectfully submitted that if the Legislature can salvage the statute the courts of Washington may also do so upon a proper case being presented to them.

The court should have abstained from even ruling upon this case and for that reason this Court should grant plenary review of the appeal.

II.

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED VANCE v. UNIVERSAL AMUSEMENT CO., INC., 63 L.Ed2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The Circuit erred by applying Vance v. Universal Amusement Co., Inc., _____ U.S. _____, 63 L.Ed.2d 413, _____ S.Ct. _____ (1980), to the Washington statute as controlling the question involved. In Vance, this Court held that a statutory procedure that called upon an ancillary process allowing a temporary injunction of indefinite duration upon an ex parte application showing probable success on the merits without a hearing was a prior restraint.

The Circuit decided appropriately that Vance did not strike down the procedure for a restraining order provided by RCW 7.48.062 in view of the fact that it was of limited duration even though this was the basis of the District Court holding. This difference between the District and Circuit courts obviously shows that a state court could have authoritatively construed the statute.

The Circuit erred in proceeding one step further and applying the Vance case to the temporary injunction provided by RCW 7.48.066 in view of the fact that

said temporary injunction can only be obtained after a hearing and Vance was limited to a situation which was ex parte. The Circuit also failed to consider that the temporary injunction may, but need not be applied for and if it is the hearing must be set within ten days.

The Circuit complained that "no limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction." Appendix, page 44a. On the contrary, the court is confined to the definition of lewd matter embodied in RCW 7.48.050(2), recognized by the Circuit as incorporating the standards approved in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). See opinion, footnote 1, Appendix, page 40a. It must obviously be established that a lewd film or lewd publication is involved on a premises before the court can hold that said premises is a nuisance.

In addition, the Circuit decided that the delay to the next term of court (which in Spokane County is the next month) would be too long and thus not a prompt judicial determination even though they cited authority holding that four to six months may be too long. The Circuit erroneously applied RCW 7.48.064 which allows the defendant, or the court to advance and consolidate the trial of the action on the merits to the hearing on the temporary injunction on the basis that there was no assurance that would occur. RCW 7.48.066 was obviously overlooked by the Circuit since it provides that the defendant shall show cause in thirty days why the injunction should not be made permanent. Hence, there is not a delay which should render the procedure invalid.

The Circuit also misapplied the thrust of the statute in thinking that it is directed at persons rather than places. Hence, the Circuit opines that the State may not place the burden on the owner to show "good faith". The appellant contends that since at that point a hearing has been held to establish that the place is a nuisance and the appropriate burden has been sustained against "the place", it is quite appropriate that the burden be on persons, such as owners, to show "good faith" in order to obtain release of the premises.

Furthermore, the Circuit misapplied the provision concerning a permanent injunction with the thought that it could constitute a prior restraint of material not yet judged to be obscene. The permanent injunction can only apply to that nuisance with reference to which the court has had a hearing, i.e., the place where lewd films are publicly exhibited as a regular course of business, etc. (7.48.052(1)), the place where a lewd film is publicly and repeatedly exhibited, etc. (7.48.052(2)), a film which is publicly exhibited at a place which is a nuisance (7.48.052(3)), a place of business in which lewd publications constitute a principal part of a stock in trade (7.48.052(4)), or a lewd publication possessed at a place, which is a moral nuisance (7.48.052(5)). Hence, material with reference to which there had not been a hearing could not be enjoined.

While it is true that a permanent closure of the place may be granted for a period of one year, that follows only as a punishment or forfeiture of property because inappropriately used.

This Court held in Near v. Minnesota, 283 U.S. 697, 714, 75 L.Ed. 1357, 51 S.Ct. 625 (1931):

> This Court said, in Patterson v. Colorado, 205 U.S. 454, 462, 51 L.Ed. 879, 881, 27 S.Ct. 556, 10 Ann. Cas. 689: In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments', and they do not prevent a subsequent punishment of such as may be deemed contrary to the public welfare . . . (Second emphasis supplied).

See also Mugler v. Kansas, 123 U.S. 205, 214, 31 L.Ed. 652 (1887).

For the above reason, the Circuit erred in its opinion and this Court should grant plenary review of the appeal.

III.

> WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION"?

Appellant had argued that when this Court dismissed for lack of a substantial Federal question the case of Art Theatre Guild, Inc., et al. v. Ewing,

421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975), it was controlling and the lower Federal courts should have been guided by that dismissal as an indication that the Court was upholding the Ohio statutory procedure upon which the Washington statute was based. See Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975).

Although the appellant presented such argument based on the above cases, the Circuit in deciding the instant case and the question of the procedure involved makes no mention of these cases or said argument in the opinion. It is submitted that since the Circuit decided that the restraining order did not render the statute unconstitutional as had been decided by the District Court, it should have decided that the remainder of the statute had been upheld by virtue of the fact that it provided for the same procedure set out under Ohio law and passed upon by this Court in the Art Theatre Guild case.

A review of the Ohio Supreme Court decision at 307 N.E.2d 917-918, shows that an order closing a theatre which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene). It is clear that the Ohio Supreme Court considered the question of prior restraint when it stated at 307 N.E.2d 916:

> Appellants' fourth, fifth and seventh arguments concerning the constitutionality of R.C. 3767.01 et seq., as a method for controlling obscenity, are premised upon the belief that the laws permit censorship without a prior judicial determination of obscenity. This contention has already been discussed and rejected in this opinion.

When an appeal to the Supreme Court is from the lower federal courts, summary disposition on the merits is by affirmance. On the other hand when the appeal to the Supreme Court is from a state court, summary disposition on the merits is by dismissal for want of a substantial federal question. In a note entitled, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, it was said at 52 B.U.L. Rev. 414-415:

> . . .Thus, the current working rule is that for summary dispositions on the merits, appeals from state court decisions are dismissed while federal court decisions are generally affirmed.[295] The distinction is reflected in Rule 16(1)(b) and (c), relating to motions to dismiss, in the case of state courts, or to affirm, in the case of federal courts.[296] At any rate, it is fairly clear that the effect of the decision is the same in both cases,[297] subject to one

qualification:

> [D]ismissal for want of a substantial federal question in a state court appeal is fully equivalent to affirmance on the merits in an appeal from a federal court insofar as the federal questions under 28 U.S.C. § 1257(1) and (2) are concerned.[298] (Footnotes omitted)

And at 52 B.U.L. Rev. 419, it is said:

> Closely allied to the use of the summary dismissal as precedent is the question of whether such dispositions really go to the 'merits' of the case acted upon. If these decisions were not 'on the merits,' just as dismissals for want of jurisdiction and the like, they would have no force as precedent. It has been suggested that the notion that dismissals for insubstantiality are on the merits is 'pure fiction.'[332] But when one considers that the summary dismissal is, as far as the Court's disposition of federal questions is concerned, the equivalent of the summary affirmance,[333] such objections evaporate. The dismissal, in particular,[334] has almost always been correctly characterized as on the merits.[335] At times, however, this fact has been given only begrudging

> acceptance.[336] Such reluctance may be attributable to the fact that an affirmance 'sounds' so much more like a decision on the merits, while a dismissal for want of a substantial federal question 'sounds' so much more like a jurisdictional defect. But whatever the potential theoretical differences that could be drawn, the fact remains that the Court draws no distinction between the two for purposes of deciding cases 'on the merits.' (Footnotes omitted)

Therefore, there is no distinction between a summary affirmance and a dismissal for insubstantial federal question.

Some guidance needs to be given to all courts with regard to this issue as was recently recognized in Colorado Springs Amusements, Ltd. etc. et al v. Rizzo, 428 U.S. 913, 49 L.Ed.2d 1222, 96 S.Ct. 3228 (1976)(J. Brennan, dissenting). See also Singleton v. Commissioner, 439 U.S. 940, 58 L.Ed.2d 335, 99 S.Ct. 335 (1978) (J. Stevens).

The Circuit court should have been bound by this consideration and therefore upheld the procedures as having been ruled upon. Because the court did not, this Court should grant plenary review to the appeal.

CONCLUSION

For each and all of the above reasons, this Court should grant plenary review to the appeal of this case from

the Ninth Circuit Court of Appeals. The matters are of sufficient public importance and need to be decided to establish that as this Court has held time and time again, obscenity is not protected free speech and there is in fact an effective statutorily constitutional method of controlling it.

Respectfully submitted,

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APPENDIX

SPOKANE ARCADES, INC.,
A Washington Corporation, Plaintiff,

v.

The Honorable Dixie Lee RAY, as Governor of the State of Washington in her representative capacity only, the Honorable Bruce K. Chapman, Secretary of State of Washington in his representative capacity only, the Honorable Slade Gorton, as Attorney General of the State of Washington in his representative capacity only, and Donald C. Brockett, Spokane County Prosecuting Attorney in his representative capaccity only, Defendants.

No. C 77-353

United State District Court,
E. D. Washington.

Feb. 6, 1978.

1 Proprietors of movie houses and book stores located in various cities in the state of Washington brought suit challenging the constitutionality of Washington's moral nuisance statute enacted by initiative 335. Injunctive and declaratory relief was sought. The District Court, Fitzgerald, J., held that (1) since plaintiffs, whose businesses were the type of establishments that Washington's moral nuisance statute purported to regulate, were threatened with the real and immediate prospect of prosecution under the statute, and since there was every reason to believe that state, county or city prosecutors, or private citizens, would imminently prosecute one or

more of the plaintiffs on the basis of the initiative, plaintiffs had standing to attack it on First and Fourteenth Amendment grounds, (2) neither Younger nor Pullman abstention was appropriate, since, relative to Younger, no state judicial proceedings involving the initiative were before Washington courts and there would thus be no disruption of state judicial proceedings, and since, relative to Pullman, the procedures of the initiative dealing with obscenity were neither obscure nor ambiguous and statutory construction to ascertain their meaning was not required, and (3) the procedures of prior restraint under the moral nuisance statute failed to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment and were therefore unconstitutional; furthermore, the initiative's contempt provision was invalid as providing a summary procedure for trial of indirect contempts.

Judgment in favor of plaintiffs.

1. Constitutional Law Key 42.2(1)

Since plaintiffs, whose businesses were the type of establishments that Washington's moral nuisance statute enacted by initiative 335 purported to regulate, were threatened with the real and immediate prospect of prosecution under the statute, and since there was every reason to believe that state, county or city prosecutors, or private citizens, would imminently prosecute one or more of the plaintiffs on the basis of the initiative, plaintiffs had standing to attack it on First and Fourteenth Amendment grounds. RCWA 7.48.010 et seq.; U.S.C.A. Const. Amends. 1, 14.

2. Courts Key 508(1)

Normally, the mere possibility of erroneous initial application of constitutional standards by a state will not justify the enjoining of state statutory procedures.

3. Constitutional Law Key 90(3)

Statutes regulating expression must be narrowly drawn to avoid the jeopardizing of First Amendment rights. RCWA 7.48.010 et seq.; U.S.C.A.Const. Amend. 1.

4. Federal Courts Key 41

Neither Younger nor Pullman abstention was appropriate in suit challenging the validity of Washington's moral nuisance statute enacted by initiative 335, since, relative to Younger, no statute judicial proceedings involving the initiative were before Washington courts and there would thus be no disruption of state judicial proceedings, and since, relative to Pullman, the procedures of the initiative dealing with obscenity were neither obscure nor ambiguous and statutory construction to ascertain their meaning was not required. RCWA 2.60.010-2.60.900, 7.48.010 et seq.

5. Obscenity Key 2

The constitutionality of Washington's moral nuisance statute, enacted by initiative 335, was not foreclosed by prior authoritative decisions of the United States Supreme Court. RCWA 7.48.010 et seq.

6. Obscenity Key 1

Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene.

7. Constitutional Law Key 90.1(1)

As a general rule, it is presumed that expression is protected under the First Amendment until the final judicial determination of obscenity is made, but the boundaries delineating obscene material from the nonobscene are murky and ill defined. U.S.C.A.Const. Amend. 1.

8. Constitutional Law Key 90(3)

Statutory prior restraints upon First Amendment rights in any setting must be carefully and closely drawn. U.S.C.A.Const. Amend. 1.

9. Constitutional Law Key 90(3)

Three safeguards must be established before prior restraint on First Amendment rights can withstand constitutional scrutiny: first, the burden of instituting judicial proceedings and of proving that the material is unprotected must rest on the censor; second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo; and third, a prompt judicial determination must be assured. U.S.C.A.Const. Amend. 1.

10. Constitutional Law Key 90.1(8)
Obscenity Key 2

The procedures of prior restraint under Washington's moral nuisance statute, enacted by initiative 335, failed to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment and were therefore unconstitutional; furthermore, the initiative's contempt provision was invalid as providing a summary procedure for trial of indirect contempts. RCWA 7.48.010 et seq., 7.48.062, 7.48.080 U.S.C.A.Const. Amend. 1.

11. Contempt Key 52

Summary punishment is reserved for direct contempt, i. e., misbehavior which happens under the court's own eye within its hearing. RCWA 7.48.080.

12. Federal Courts Key 51

A declaratory judgment finding a state law unconstitutional involves less of an intrusion into the practices and policies of a state that an injunction.

Robert Eugene Smith, Atlanta, Ga., Jack R. Burns, Hubbard & Burns, P. S., Kirkland, Wash., for plaintiff.

Leland T. Johnson, Jr., Asst. Atty. Gen., Slade Gorton, Atty. Gen., Olympia, Wash., Donald C. Brockett, Spokane County Pros. Atty., Spokane, Wash., for defendants.

OPINION

FITZGERALD, District Judge.

The State of Washington, by initiative,[1] has adopted a broad and comprehensive law dealing with obscenity.

Under Initiative 335, certain places are declared to be "moral nuisances" and, as such, injurious to public morals. Section 2 of the initiative lists the types of places which constitute a moral nuisance. Among the establishments listed are theatres which exhibit "lewd films" and book stores which deal in "lewd publications."

Employing the procedures of Initiative 335, the attorney general, county or city prosecutors, or any private citizen may bring an equitable action to abate the alleged moral nuisance by filing a verified complaint. After the filing of the complaint with a request for a temporary injunction, the judge is required to grant a hearing within ten days. Upon application (but before any judicial determination of obscenity) the court can issue an ex parte order prohibiting anyone from removing the contents of the establishment pending the hearing on a motion for a temporary injunction. And even if the order banning removal should not extend to all goods in the establishment, the proprietor may be required to keep a full accounting of all business

1. Initiative Measure No. 335 (Approved November 8, 1977); 1913 c. 127, RRS § 946; RCW c. 7.48

transactions. Summary contempt punishment is allowed for violations of any injunctions issued under Initiative 335.

If on hearing for a temporary injunction it should be determined that a temporary injunction will issue and if the person controlling the alleged nuisance was given three days notice for the hearing, the issuing court may declare a temporary forfeiture of the real property involved until a final decision is made on a permanent injunction. After a final determination that a place is a moral nuisance, the judicially declared lewd matter is to be destroyed, funds received for the sale of such lewd matter is forfeited to the local government, and the real property where the nuisance was located may be closed to any purpose for up to one year.

The plaintiffs operate movie houses and book stores where sexually oriented materials are exhibited or sold to the public. They have brought this case in federal court claiming violations of federal constitutional rights and demand injunctive and declaratory relief. The central issue is whether Initiative 335 is constitutionally valid.

JURISDICTION

The plaintiffs' amended complaint claims violations of the United States Constitution, principally of the First Amendment and the Due Process provision of the Fourteenth Amendment and additional violations of the Fourth, Fifth and Sixth Amendments.

This court has jurisdiction under the provisions of 28 U.S.C. § 1343(3).

STANDING

[1] The plaintiffs operate a number of movie houses and book stores located in various cities in the State of Washington. There can be little doubt that the authors and supporters of Initiative 335 intended to provide an effective and comprehensive means of controlling obscenity in Washington. It is to be expected that the state attorney general and the county prosecutors of Washington will faithfully and energetically perform their duties under the law. Should they fail to do so, private persons are authorized by the initiative to maintain an action.

The plaintiffs' movie houses and book stores offer sexually oriented materials to the public which they contend are protected under the First Amendment of the United States Constitution. Threat of prosecutions is very real to the plaintiffs, and the consequences will be substantial. The initiative, by its terms, permits forfeiture of all money collected by admissions or sale, forfeiture of contents and fixtures of the place where any obscene materials are found, an order closing the place to any use for as long as a year, forfeiture of any lease on the premises, and an injunction perpetually enjoining the defendants from maintaining a nuisance anywhere.

[2, 3] Normally, the mere possibility of erroneous initial application of

constitutional standards by a state will not justify the enjoining of state statutory procedures. But statutes regulating expression must be narrowly drawn to avoid the jeopardizing of First Amendment rights. Dombrowksi v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L. Ed. 2d 22 (1965).

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. [citations omitted] As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendments area--'attacks on overly-broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister. Broadrick v.Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2916, 37 L. Ed.2d 830 (1973).

Nor does Broadrick v. Oklahoma undercut Dombrowski, as the defendants contend. In Broadrick, the Court reviewed an Oklahoma law which prohibited certain political activity by state employees. The Court explicitly adopted the broad

standing requirement of Dombrowski, at least as it pertains to speech or expression:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.
> Broadrick v. Oklahoma, at 612, 93 S.Ct. at 2916.

But the Court in Broadrick did qualify its broad standing requirements, noting that where conduct and not speech is regulated, statutory overbreadth must be not only real but substantial.

It is plain that Initiative 335 is broadly drawn and purposely drafted to cast a broad net effectively prohibiting and deterring the dissemination of obscene material. The initiative exposes anyone who undertakes public exhibition or sale of sexually oriented material to the risk of losing not only condemned material but the proceeds of the business, and the place where the business is conducted if the material is later determined to be obscene. Beyond this, once proceedings have been filed, the court may enjoin disposition of the contents and materials which are in any way connected with maintaining a nuisance as defined under the law. The officer serving the restraining order is to inventory the contents and materials which appear

to him to be connected with a nuisance. The owner may also be required to account for all transactions involving the stock in trade.[2]

The punitve provision of the initiative would in all probability cause any reasonable person to avoid the risk of public exhibition or sale of any materials in which there was any real chance of an ultimate judicial determination of obscenity.

I, therefore, conclude that Initiative 335 is overbroad and that the plaintiffs have standing in this case to attack the initiative on First and Fourteenth Amendment grounds.

THE ABSTENTION DOCTRINE

[4] The defendants argue that the doctrine of abstention should be applied in this case. This issue was first considered by United States District Judge Marshall Neill when he heard the plaintiffs' motion for a restraining order. Judge Neill concluded that abstention was inappropriate. I agree.

The defendants misconceive the policy reasons supporting the abstention doctrine. Once jurisdiction is established, a district court is under a heavy responsibility to go forward with the matter before it. The Supreme Court has noted:

> The doctrine of abstention, under which a District

2. R.C.W. 7.48.062.

> Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest. County of Allegheny v. Frank Mashuda Co., 360 U.S 185, 188-189, [79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163] (1959).

The abstention doctrine was recently considered by the Supreme Court in the case of Ohio Bureau of Employment Service v. Hodory, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977). The Court reviewed the two principal bases underlying the doctrine:

> There are, of course, two primary types of federal abstention. The first, usually referred to as Pullman abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Comm'n v. Pullman Co., 312 U.S. 496, [61 S.Ct. 643, 85

L.Ed.971](1941). See Bellotti v. Baird, 428 U.S. 132, [96 S.Ct. 2857, 49 L.Ed.2d 844] (1976). The second type is Younger abstention, in which the court is primarily concerned in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on-going state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37, [91 S.Ct. 746, 27 L.Ed.2d 669] (1971). See Huffman v. Pursue, Ltd., 420 U.S. 592, [95 S.Ct. 1200, 43 L.Ed.2d 482] (1975); Juidice v. Vail, 430 U.S. 327, [97 S.Ct. 1211, 51 L.Ed.2d 376] (1977); Trainor v. Hernandez, 431 U.S. 434, [97 S.Ct. 1911, 52 L.Ed.2d 486] (1977), id., at 448 (concurring opinion). Hodory, 431 U.S. at 477, 97 S.Ct. at 1902, 52 L.Ed.2d at 520.

The arguments made for abstention rejected in Hodory were much like those made by the defendants here. In sum, the defendants contend that since the plaintiffs are free to pursue their remedies in state court, principles of comity require abstention. But the defendants' counsel acknowledged during argument that no state judicial proceedings involving Initiative 335 are before Washington courts, and since no state judicial proceedings are to be disrupted by this proceeding, I conclude that Younger abstention is not appropriate.

The defendants rely also on Pullman abstention. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Under Pullman, abstention is proper if a state court might construe state law in a manner which removes federal constitutional implications. In support of their argument for Pullman abstention, the defendants point to Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). But that case is inapplicable. The Court in Bellotti concluded that an interpretation by the Massachusetts Supreme Judicial Court might narrow or remove the federal questions presented and suggested that the district court should have certified the question under Massachusetts' procedure directly to the Supreme Judicial Court for its construction. Certification procedure is provided for under the Revised Code of Washington, 2.60.010-2.60.900, but the interpretation given to that statute by the Supreme Court of Washington precludes certifications in the present case.[3]

The procedures of Initiative 335 dealing with obscenity are neither obscure nor ambiguous, and statory construction to ascertain their meaning is not required. What is in issue is not the meaning of the statute but whether procedures under the statute meet constitutional requirements. Since these questions ultimately involve federal issues,

3. "Nor would this court take jurisdiction of a certified question which involves ultimately a federal constitutional issue, for again this would not meet the criteria of the certification statute" In re Elliott, Wash., 446 P.2d 347, 358 (1968).

certification is not warranted and Pullman abstention is not appropriate.

THE APPLICABILITY OF HICKS v. MIRANDA

The principal thrust of the defendants' argument on the constitutional issues is that statutory procedures similar to those here in question have been previously upheld by the United States Supreme Court; further, since district courts are bound to follow decisions of the Supreme Court under the rule of Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), the constitutional issues before this court are foreclosed from present consideration.

I do not quarrel with the rule that district courts should follow the decisions of the Supreme Court and not relitigate issues of law decided by that Court. The question is whether defendants are correct in their contentions that procedures similar to those provided in Initiative 335 have been previously upheld in the Supreme Court.

The defendants rely on Grove Press, Inc., et al. v. Flask, et al., 326 F. Supp. 574 (N.D. Ohio 1970). In that case a three-judge court found the film "I Am Curious Yellow" to be obscene. Comparison of the Ohio law with Initiative 335 reveals that the procedures are in many ways similar. The district court concluded that the provisions of Ohio law that permitted an ex parte restraining order preventing the defendant or any person from interfering with the personal property and contents of an alleged nuisance was not constitutionally impermissible. But that issue was not squarely

before the court since a restraining order had been denied in state court and prior restraint was not involved. Moreover, unlike Initiative 335, the Ohio law did not permit the stock in trade to be inventoried or require a full accounting of all business transactions.

Commendably, the defendants point out that the judgment of the three-judge court in Grove Press, supra, was vacated and the case remanded after appeal to the United States Supreme Court.[4] Thus, the Supreme Court did not pass upon the constitutionality of the Ohio procedures in Grove Press, supra.

4. . . . Judgment vacated and case remanded for further consideration in light of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-ft. Reels Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed. 2d 513; Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; Roaden v. Kenucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed. 2d 757. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand case for further proceedings not inconsistent with his dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 73, 93 S.Ct. 2628. See Miller v.California, 413 U.S. 47, 93 S.Ct. 2607. . .
Grove Press, Inc., et al. v. Flask, et al., 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973).

The second case relied upon by the defendants is Ewing v. Without A Stitch, 37 Ohio St.2d 95, 307 N.Ed.2d 911 (1974). In that case the Supreme Court of Ohio granted a motion of certification allowing an appeal to consider only four issues:

> (1) The applicability of R.C. 3747.01 et seq. to a theater in cases involving the exhibition of a single obscene motion picture film; (2) the constitutionality of R.C. 3767.01 et seq. prescribing a method of controlling obscenity; (3) the mandatory or discretionary nature of the remedies set forth in R.C. 3767.01 et seq.; and (4) the availability of the nonstatutory remedy of forfeiture of box office receipts derived from the exhibition of a film after it was judicially determined to be obscene.

In its decision, the court observed that Ohio law does not permit censorship in any form prior to a judicial determination of obscenity. But the holding also undercuts the defendants' position in the present case in one other respect. The Ohio Supreme Court concluded that penalties may not be imposed under Ohio obscenity laws unless the person penalized has knowledge of the offending material's contents.[5]

5. The Ohio court noted Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) where the Supreme Court struck down an ordinance imposing criminal penalties on a book store owner for mere possession of a

[5] Following the decision of the Supreme Court of Ohio, Ewing v. Without A Stitch, an appeal was taken to the United State Supreme Court. There the appeal was dismissed for want of substantial federal question. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975). The summary dismissal of the appeal by the Supreme Court is understandable since no constitutional issue was presented. The film in question, "Without A Stitch," had been judicially determined to be obscene and under the principle of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1954) was not entitled to constitutional protection. Thus, the constitutionality of Initiative 335 is not foreclosed by prior authoritative decisions of the United States Supreme Court.

THE CONSTITUTIONAL ISSUES

[6] The purpose of Initiative 335 is to control public exhibition and sale of obscene materials.[6] Passage of the initiative is clear proof that a voting majority of the State of Washington is

book later determined to be obscene even though the owner was without knowledge of the contents of the book. The Supreme Court reasoned that to impose criminal liability in such circumstances would force book store owners to restrict the books they sell to those they had inspected which would result in restricting the distribution of constitutionally protected, as well as obscene, books.

6. "Obscene" refers to that which is repugnant or disgusting to the senses, or offensive,

opposed to public dissemination of obscene films or printed matter. The critical issue is whether the procedures selected to accomplish the evident purpose of the law meets federal constitutional requirements.

[7] As a general rule, it is presumed that expression is protected under the First Amendment until a final judicial determination of obscenity is made.[7] But as may be seen, the boundaries delineating obscene material from the non-obscene are murky and ill-defined.

The first significant attempt by the United States Supreme Court to define the legal meaning of obscenity occurred in Roth v. United States. Justice Brennan, writing for the Court, determined that obscene material is not entitled to constitutional protection. Once a final judicial determination is made that material is obscene, neither First Amendment nor other constitutional rights are

> filthy, foul, repulsive, or loathsome. Except as used in the law, it does not necessarily have any sexual connotations. "Pornography," on the other hand, derived from the greek words for harlot and writing, is limited to depictions of sexual lewdness or erotic behavior. Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene.
> Professor Frederick F. Schauer, The Law of Obscenity, (1976) p. 1.

7. U. S. v. Tupler, 564 F.2d 1294 (9th Cir. 1977). See also, Professor Schauer, The Law of Obscenity, 1976) p. 229

implicated. Under such circumstances, the State is not required to establish either compelling necessity or rational basis to destroy the pernicious material.

The principle that obscene material is beyond the scope of constitutional protections presupposes a definition of obscenity so that the boundary may be drawn between what is protected expression and what is not. The Supreme Court undertook in Roth to provide such a definition, recognizing at the outset that sex and obscenity are not synonymous. Material is said to be obscene if to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. This formulation was later augmented in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). Finally, in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), Chief Justice Burger, writing for the Court, restated the definition of obscenity as follows:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; [citations ommitted] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, supra, at 24, 93 S.Ct. at 2615.

On the same day as Miller, the Supreme Court also decided Paris Adult Theatre v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). Interestingly, in Paris Theatre Justice Brennan, the articulator of the Roth definition of obscenity, now dissented. He was convinced on the basis of 16 years of experience following Roth,[8] that no acceptable definition of obscenity could be devised which would strike an acceptable balance between the individual's constitutional rights on the one hand and the State's interest in regulating dissemination of sexually oriented material on the other.[9]

In Initiative 335 the word "lewd" is generally substituted for the term "obscene", and the definition of lewd

8. Justice Stewart, concurring in Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964), recognized the difficulty in attempting to define obscenity. He said in part: ". . . perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

9. "[N]o one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." Paris Adult Theatre, supra, 413 U.S., at 85, 93 S.Ct., at 2648.

generally follows the definition of obscenity set out in Miller.[10] The defendants suggest that since the terms "obscene or lewd" in Initiative 335 comport with the obscenity definition in Miller, the initiative cannot be found vague or overbroad. But the problem of regulating obscenity is in large part due to difficulty of definition. Freedom of expression involves sensitive and important constitutional rights. For these reasons the Supreme Court has consistently required that under the First Amendment efforts to regulate or prohibit obscenity be surround by procedural safeguards which

> . . . ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . .
> Bantam Books v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963).

Close examination of Initiative 335 inevitably leads to the conclusion that the initiative undertakes to regulate obscenity in a broad and comprehensive manner. The impact of the law is directed not only at the offending material

10. R.C.W. 7.48.050.

but at the place where such material may be found and at any entity or person connected with it.[11] The initiative applies to films, video tapes, photographs, books, magazines, pamphlets, illustrations, sound recordings and many other forms of expression.[12] It permits the attorney general or any prosecuting attorney or a citizen to initiate proceedings in the name of the State of Washington to abate as a nuisance obscene films or other material and to close every place where obscene films or material may be publicly exhibited or sold or held for those purposes.[13]

At the time proceedings are initiated under the initiative, the complainant is entitled to apply for a preliminary injunction, in which event the court must order a hearing within ten (10) days.[14] Immediately upon a complainant's filing of the proceedings, the judge is on good cause authorized to issue a restraining order enjoining the defendant and all other persons from removing or interfering with the contents and the personal property of the place where the nuisance is said to exist, excepting only stock in trade. The court may require an accounting of all business transactions taking place on the premises. The officer serving the restraining order is required to make and return to the court

11. R.C.W 7.48.052.

12. R.C.W. 7.38.050.

13. R.C.W. 7.48.058.

14. R.C.W. 7.48.060.

an inventory of the contents and personal property located and used in maintaining or conducting the nuisance.[15] A defendant must be given three (3) days notice prior to the hearing of the preliminary injunction and the court may order trial of the case expedited to the time set for the first hearing.[16]

If a preliminary injunction is granted, the court may declare temporary forfeiture on the use of the premises and issue an order closing the place for all uses until final decision is rendered.[17] An admission or finding of guilt of any person under laws dealing with obscenity or prostitution is admissible to prove existence of the nuisance and as prima facie evidence of nuisance and of knowledge and acquiescence and participation therein on the part of the person charged with maintaining the nuisance.[18] If existence of a nuisance is established at trial, the court shall enter judgment perpetually enjoining the defendant and any other person from further maintaining the nuisance complained of and enjoining the defendant from ever maintaining a nuisance anywhere.[19] Violations of the restraining order constitute contempts of court which may be summarily punished.[20]

15. R.C.W. 7.48.062.

16. R.C.W. 7.48.064.

17. R.C.W. 7.48.066.

18. R.C.W. 7.48.072.

19. R.C.W. 7.48.078.

20. R.C.W. 7.48.080.

The Supreme Court in Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) considered Missouri procedures somewhat similar to those outlined in Initiative 335. In that case under Missouri law, police officers were permitted to file a sworn accusation in court alleging possession of obscene publications for sale. On the basis of the accusation, the court in an ex parte proceedings could issue a warrant requiring seizure of the offending material. The court in which the matter was pending was required promptly to set a time for hearing.

The Supreme Court held that the Missouri procedures failed to provide due process sufficient to safeguard constitutionally protected expression under the First and Fourteenth Amendments. The Court noted that the holding in Roth recognized no state power to restrict the dissemination of books which are not obscene:

> The question here is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression. We held in Roth v. United States, 354 U.S. 476, 485, [77 S.Ct. 1304, 1 L.Ed.2d 1498,] that 'obscenity is not within the area of constitutionally protected speech or press.' But in Roth itself we expressly recognized the complexity of the test of obscenity fashioned in that case and the vital necessity in its

application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Id., p. 488, 77 S.Ct. 1304. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression. In Smith v. California, 361 U.S. 147, 155, [80 S.Ct. 215, 4 L.Ed.2d 205] we said, 'The existence of the State's power to prevent the distribution of obscene material does not mean that there can be no constitutional barrier to any form of practical exercise of that power,' inasmuch as 'our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene.' . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publication. '. . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .' Speiser v. Randall, 357 U.S. 513, 525, [78 S.Ct. 1332, 2 L.Ed.2d 1460].

> It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedure it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.
>
> We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Marcus v. Search Warrant, 367 U.S. at 729, 731, 81 S.Ct. at 1715.

While Initiative 335 does not authorize seizure of obscene material under warrant, it does, as has been described, authorize a judicial officer to restrain removal of contents or personal property of the place where a nuisance allegedly exists. Neither propety nor contents may be removed from the premises under the threat of contempt. Moreover, the court may order an accounting of all other business transactions involving the stock in trade.[21] Such restraints are permissible under Initiative 335 before a judicial determination is made whether the material is obscene. Since the boundary between obscene and non-obscene material is difficult to draw, the inevitable result must be that constitutionally protected material will be swept along with the obscene. The central point made in Marcus was that the Missouri procedures failed to provide adequate constitutional

21. R.C.W. 7.48.062.

protections for non-obscene material. Initiative 335 suffers from the same defect of permitting the suppression of protected expression.

[8] I have noted that some members of the Supreme Court now believe it impossible to define obscenity within the certainty required by law. Even more importantly, fundamental and sensitive constitutional rights are involved. Understandably, then, statutory prior restraints upon First Amendment rights in any setting must be carefully and closely drawn.

[9] The plaintiffs have attacked Initiative 335 as an unconstitutional prior restraint on freedom of expression. The defendants rejoin that prior restraints are not necessarily unconstitutional as long as they follow certain procedural requirements. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Under the Freedman-Southeastern Promotions test, three safeguards must be established before the prior restraint can withstand constitutional scrutiny. "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified period and only for the purpose of preserving the status quo. Third, a prompt judicial determination must be assured." Southeastern Promotions, supra, at 560, 95 S.Ct. at 1247.

This tripartite test for prior restraints has been examined in a series of cases following Freedman v. Maryland.

In Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S. Ct. 754, 19 L.Ed.2d 966 (1968), the Court reviewed a Chicago film censorship ordinance which required a film exhibitor to obtain a permit from the Chicago Police Department prior to showing the film. An administrative and judicial appeals procedure was available when a permit was denied. The Court found that the procedure violated the second and third parts of the Freedman standard in that it allowed 50-57 days to complete the administrative process, and there was no provision for a prompt judicial decision.

United States Post Office regulations aimed at mailers of allegedly obscene material were examined in Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). Under the regulations, the Postmaster General made the determination that certain mailers were using the Post Office to convey materials or solicit money for materials which had been designated as obscene by the Postmaster General. In that event, the Postmaster General required the offending mail to be returned to the mailer. The mailer was prohibited from cashing postal money orders for the supposedly obscene mail. The Court found the regulations similar to those rejected in Marcus v. Search Warrant, and that they violated all three parts of the Freedman test.

The Court scrutinized another federal statute in United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct.

1400, 28 L. Ed.2d 822 (1971) and found that the customs seizure of sexually-explicit photographs met the first and second parts of the standard. In regard to the thirds aspect, "a prompt final judicial determination", the Court examined the facts of the particular seizure and found that promptness would have been possible had the photographs' owner not challenged the statute. The Court concluded that since federal statutes can be saved by judicial construction if the construction does not require a rewriting of the statute and if the judicial construction is in accord with the statute's legislative history, the customs seizure conformed to Freedman.

In Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), the Court affirmed the seizure of a single copy of a motion picture film which was seized as evidence after a judge of the New York Criminal Court viewed the film at a theatre and immediately signed a warrant. Heller amplified the Court's holding in Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968) which provided that a full adversary hearing was not required before the seizing of a single piece of evidence if the prior judicial determination was constitutionally valid. The Heller decision carefull distinguished between seizure of individual pieces of evidence and prior restraints of quantities of material:

> Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain

> that the requirements of A Quantity of Books and Marcus are full met.
> Heller, 413 U.S. at 491, 93 S.Ct. at 2794.

The most recent Supreme Court considerations of prior restraints emphasize the ongoing adherence to the Freedman test. As noted above, Southeastern Promotions is a direct affirmation of the standard. Further, in McKinney v. Alabama, 424 U.S. 669, 96 S. Ct. 1189, 47 L.Ed.2d 387 (1976) the Court reviewed Alabama's obscenity regulation scheme and found that it did not conform to the "necessary sensitivity to freedom of expression" required by Freedman and Heller. McKinney, at 674, 96 S.Ct. at 1193. The continuing concern with the heavy burden of prior restraint is seen in the Court's rejection of a state court's gag order in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L.Ed.2d 683 (1976). While the issue in that case was not obscenity, the Court's detailed discussion of prior restraint emphasized the constitutional limitations on censorship, and Justice Brennan's concurring opinion approvingly quoted a commentator's summary of the difficulties of such restraint:

> A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be

> applied than suppression through a criminal process; the procedures to not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows. T. Emerson, The System of Freedom of Expression 506 (1970)
> Nebraska Press Assn. v. Stuart, at 589-590, 96 S.Ct. at 2817.

While arguably satisfying the first and third parts of the Freedman test, Initiative 335 fails to meet the second requirement that any prior restraint may be imposed only for the purpose of preserving the status quo. As already pointed out, section 7 of the initiative[22] allows the court to issue an order "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist . . ." Since a defendant could under this provision be prohibited from disposing of all of his merchandise pending a judicial determination, the State could during the interim period effectively shut down a business charged with conducting a nuisance.[23] Instead of

22. R.C.W. 7.48.062.

23. The provision is not saved by the limitation that ". . . pending such [judicial]

carefully limiting the scope of a restraining order to specific pieces of merchandise and allowing the business itself to continue to function, the initiative may well severely alter the status quo to the defendant's detriment.

Moreover, even if certain merchandise designated as "stock in trade" is not restrained, section 7 provides that "an inventory and full accounting of all business transactions may be required." Again, rather than maintaining the status quo, this provision imposes additional burdens on a defendant before a judicial determination of a moral nuisance has been made.

[10] I therefore conclude that the initiative's procedures of prior restraint fail to withstand the strict scrutiny required of large-scale seizures of material protected under the First Amendment, Heller, and are therefore unconstitutional.

Another serious question arises in connection with the contempt provision of the initiative. As part of the enforcement power conferred by Initiative 335,

> decision the stock in trade may not be so restrained." Presumably, "stock in trade" means that merchandise not considered to be part of the moral nuisance. But since the initiative nowhere defines the difference between "personal property and contents of the place where such nuisance is alleged to exist", which may be restrained, and "stock in trade", which may not be restrained, non-obscene as well as obscene material could be swept into the net of a restraining order.

any person found by a court to have violated any injunction prescribed by the initiative is subject to summary trial and punishment in the court which has issued the injunction. The contempt section[24] of the initiative provides in part:

> In case of the violation of any injunction granted under the provision of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment.

Under the law, a variety of acts may subject the actor to summary contempt proceedings. Those acts include removing or

24. R.C.W. 7.48.080.

mutilating a copy of the restraining order posted on the premises of the alleged nuisance; selling or projecting the allegedly obscene or pornographic books and films prior to a judicial determination; selling the stock in trade of a temporarily restrained establishement without keeping complete records of the transactions; and removing the contents and personal property of a restrained establishment.[25] While these forms of potential contempt differ, they will all ordinarily occur outside the direct presence of the court which has issued the temporary, preliminary or permanent injunction.

[11] But summary punishment is reserved for direct contempt, and direct contempt is defined as that misbehavior which happens "under [the court's] own eye within its hearing", Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed.405 (1888). As defined by a recent Ninth Circuit case arising in the State of Washington:

> Indirect contempt is contumacious behavior occurring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contemnor. United States v. Marshall, 451 F.2d 372, 373 (1971).

Indirect contempts as such cannot be tried in the summary manner of 7.48.080. Rather, as the United States Supreme Court emphasized over half a certury ago:

25. R.C.W. 7.48.080.

> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925).

CONCLUSION

I conclude that statutory procedures similar to those contained in Initiative 335 have not previously been sustained in the United States Supreme Court. I conclude that the initiative is overbroad and fails to provide sufficient safeguards for constitutionally protected expression. Procedures under the initiative amount to a constitutionally impermissible prior restraint upon freedom of speech.

As noted, the plaintiffs now before this court are threatened with the real and immediate prospect of prosecution under Washington's moral nuisance statute. The plaintiffs' businesses are the type of establishments that the statute

purports to regulate. There is every reason to believe that the State of Washington, county or city prosecutors, or private citizens will imminently prosecute one or more of the plaintiffs on the basis of Initiative 335. As was noted by the Supreme Court in Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974):

> In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.
> Steffel, at 459, 94 S.Ct. at 1216.

In short, these plaintiffs and these defendants present an actual, continuing controversy to this court.

[12] My examination of the statute enacted by Initiative 335 leads me to conclude that the statute is facially unconstitutional. A declaratory judgment finding a state law unconstitutional involves less of an instrusion into the practices and policies of a state than an injunction. Steffel v. Thompson, and as I believe that the responsible state officers involved in this action will not prosecute under an unconstitutional statute, I find no present necessity for the issuance of an injunction.

Accordingly, I find that plaintiffs are entitled under 28 U.S.C. §2201 to a declaratory judgment that Initiative 335 is unconstitutional on its face.

SPOKANE ARCADES, INC., a Washington Corporation; Playtime Theatres, Inc., a Washington Corporation; J-R Distributors, Inc., a Washington Corporation; and Sportland Amusement, Inc., a Washington Corporation, Plaintiffs-Appellees,

v.

Donald C. BROCKETT, Prosecuting Attorney, etc., Defendants-Appellants,

and

The Honorable Dixie Lee Ray, as Governor of the State of Washington, et al., Defendants.

SPOKANE ARCADES, INC., a Washington Corporation; Playtime Theatres, Inc., a Washington corporation; J-R Distributors, Inc., a Washington corporation; and Sportland Amusement, Inc., etc., Plaintiffs-Appellees,

v.

The Honorable Dixie Lee RAY, as Governor of the State of Washington, in her representative capacity only, et al., Defendants,

and

Hon. Slade Gorton, as Attorney General of the State of Washington, in his representative capacity only, Defendant-Appellant.

Nos. 78-2369, 78-2520

United States Court of Appeals,
Ninth Circuit

Before KILKENNY and SNEED, Circuit Judges, and CALLISTER*, District Judge

SNEED, Circuit Judge:

At issue is the constitutionality of Wash. Rev. Code §§ 7.48.050-100 (West Supp. 1980), a moral nuisance law, which is directed primarily at prohibiting the public sale or exhibition of obscene materials. Appellee, a Washington corporation engaged in the exhibition, sale, and distribution of sexually oriented materials, filed suit in federal district court, requesting declaratory and injunctive relief to prevent enforcement of the statute.

The district court declared the statute unconstitutional under the First Amendment but declined to grant injunctive relief. Appellees no longer contest the denial of injunctive relief. Guided by Vance v. Universal Amusement Co., Inc., ___ U.S. ___, 100 S. Ct. 1156 (1980), 63 L.Ed.2d 413 (1980), we affirm the district court's holding with respect to the unconstitutionality of the Washington statute. Jurisdiction of the district court rested on 28 U.S.C. § 1331 (a), 28 U.S.C. § 1343, and 28 U.S.C. § 2202. Our jurisdiction rests on 28 U.S.C. § 1291.

*Honorable Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

I.

THE STATUTE

The statute declares a number of places and articles to be moral nuisances, including any place that repeatedly or as a regular course of business exhibits "lewd matter."[1] The attorney general, city or county prosecutors, or, upon payment of a bond, any citizen may bring an action in equity to abate and enjoin a moral nuisance. Wash. Rev. Code § 7.48.058.[2]

If the allegations of the complaint have been sustained "to the satisfaction of the court or judge," the court

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1. The statutory definition of "lewd matter" expressly incorporates the standards approved in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Wash. Rev. Code § 7.48.050(2).

Any place of business in which "lewd publications" constitute a principal part of the stock in trade is a moral nuisance. Id. § 7.48.052. The furniture, fixtures, and contents of a place found to be a moral nuisance, as well as the proceeds from the sale or exhibition of obscene materials, are also labelled moral nuisances. Id. § 7.48.054.

2. If the complainant applies for a temporary injunction, a hearing on the application must be held within ten days. Id. § 7.48.060. Service of the complaint and notice to the defendant must be made at least three days before the hearing. Id. § 7.48.064.

shall issue a temporary injunction against continuance of the nuisance. Unless the defendant demonstrates that the nuisance has been abated, or unless the owner of the property has taken action as a "good faith" lessor to void the lease, the court shall also issue an order closing the place alleged to be a nuisance against use "for any purpose," pending trial and final decision of the case. Id. § 7.48.066.

The trial on the merits may be consolidated with the hearing for the temporary injunction, id. § 7.48.064; otherwise, the trial shall be scheduled for the first term of court and shall have priority over all other cases except crimes, election contests, or injunctions. Id. § 7.48.070. If the existence of the nuisance is established at trial, the court shall issue a permanent injunction against the maintenance of the nuisance, id. § 7.48.076, and the closing order will be extended for one year. Id. § 7.48.078.[3] Violation of any injunc-

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3. In addition, lewd matter shall be destroyed, and other personal property used in conducting the nuisance shall be sold, id. § 7.48.078; and all money and other consideration found to be a nuisance shall be forfeited to the local government. Id. § 7.48.090. Persons found to have maintained the nuisance shall be required to pay a three hundred dollar penalty as well as the costs of abating the nuisance. Id. §§ 7.48.076, 7.48.078. The statute provides that owners of property used to maintain the nuisance who lack knowledge of the nuisance may recover their personal property, id. § 7.48.078; they may also prevent the issuance of any closing or restrain-

tion issued under the statute is[4] punishable as contempt. Id. § 7.48.080.

II.

ABSTENTION

Appellants contend that under Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the district court should have abstained from deciding this case so as to allow state courts the first opportunity to construe the statutory provisions. We disagree. The district court correctly held that Pullman abstention would be inappropriate.

First, appellee is not required to exhaust all state remedies prior to bringing this action in federal court. Zwickler v. Koota, 389 U.S. 241, 251, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967); Vance, _____ U.S. _____, 100 S.Ct. 1156, 63 L.Ed.2d 413. Second, appellants do not allege that their statute is vague. Even if there are vagueness difficulties, the dispositive issue is whether the procedures are capable of a construction that could avoid the constitutional issues. We do not think that the procedures are capable of such a construction. Therefore, we conclude that Pullman abstention would not eliminate or materially alter the constitutional

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ing order, or obtain the cancellation of any such order already issued, by filing a bond and giving assurance that the nuisance will be abated. Id. § 7.48.068.

4. Contempt may be punished by a fine of between two hundred and one thousand dollars, or imprisonment in the county jail for a term of between three and six months, or both. Id. § 7.48.080.

issues presented. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 481 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1976). That First Amendment rights of expression are at stake makes abstention all the more inappropriate. Zwickler, 389 U.S. at 252, 88 S.Ct. at 397; See also Vance, _____ U.S. _____, 100 S. Ct. 1156, 63 L.Ed.2d 413.

III.

THE TEMPORARY RESTRAINING ORDER

The statute permits a court, upon a showing of good cause, to issue a temporary ex parte restraining order prohibiting removal of or interference with the personal property and contents of a place alleged to be a nuisance. The stock in trade may not be restrained but an inventory and full accounting of all business transactions may be required. Wash. Rev. Code § 7.48.062. The purpose of the restraining order is apparently to prevent the removal of evidence or contraband; exhibition of any film or the sale of any publication is not forbidden. Hence, the order imposes no prior restraint.

The Supreme Court has indicated that restraints imposed for specified brief periods to preserve the status quo are permissible. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448; Heller v. New York, 413 U.S. 483, 490, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973). Since this restraining order will expire within ten days after its issuance, Wash. Rev. Code § 7.48.060, we find it to be permissible.

IV.

THE ABATEMENT INJUNCTION

The statute permits a court to issue temporary and permanent injunctions against the maintenance of a nuisance. Wash. Rev. Code § 7.48.066. In reviewing this section, we are required to acknowledge that

> "the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."

Vance, _____ U.S. at _____, 100 S. Ct. at 1161. For the following reasons, we conclude that with respect to this section the heavy burden of justification has not been discharged. It constitutes an impermissible prior restraint.

First, the injunction may be issued if the allegations of the complaint are demonstrated "to the satisfaction of the court. . . ." Wash. Rev. Code § 7.48.066. No limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction.

Second, There is no assurance that there will occur the required prompt final judicial determination on the merits. Southeastern Promotions, 420 U.S. at 560, 95 S.Ct. at 1247. The provision allowing permissive consolidation of the trial on the merits with the hearing for the temporary injunction is inadequate since there is no assurance that such a consolidation will occur.

The priority provision is likewise inadequate. Requiring that the moral nuisance action be scheduled for the first term of court, and giving priority over other cases except crimes, election contests, and injunctions, does not offer the assurance of a prompt final determination. Though the Supreme Court has set no precise limits on the period within which a final judicial determination must be made, in Freedman v. Maryland, 380 U.S. 51, 55, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965), the Court suggested that four to six months was too long. See also Southeastern Promotions, 420 U.S. at 562, 95 S.Ct. at 1248. There is nothing in the Washington statute to assure that final decisions would be rendered in a shorter period.

Third, the injunction operates to prevent the sale or exhibition of named or unnamed films or publications in the future even though not yet declared obscene. Since a defense of nonobscenity presumably is unavailable at a trial for violation of an injunction, see Walker v. Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1966), this type of prior restraint is "more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited." Vance, _____ U.S. at _____, 100 S. Ct. at 1161.

Fourth, the temporary injunction provision is not saved by the fact that it may be lifted if the owner/operator can show "to the satisfaction of the judge" that the nuisance has been abated. In addition to the imprecise standard given the court, the provision impermissibly shifts the burden of showing a lack of obscenity to the person

operating the alleged nuisance. Both the burden of instituting proceedings and the burden of persuasion "must rest on the censor." Southeastern, 420 U.S. at 560, 95 S.Ct. at 1247; Freedman, 380 U.S. at 58-59, 85 S.Ct. at 738-739.

The abatement injunction provision lacks sufficient safeguards to comply with the First Amendment. As the Court stated in Vance:

> "[T]he absence to any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against . . . exhibitors."

_____ U.S. at _____, 100 S. Ct. at 1162.

V.

THE CLOSURE ORDER

The statute permits a court to enter an order closing a place of business against use "for any purpose" if such place is found to be a nuisance. The order is initially temporary, but after a final decision on the merits, it will be extended for one year. Wash. Rev. Code §§ 7.48.066, 7.48.078.

The ability of a court to close a place temporarily because obscene materials may have been sold, distributed, or exhibited on the premises is an impermissible prior restraint. We express no opinion with respect to what

circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment.

VI.

SEVERABILITY

Appellants contend that the entire statute should not be invalidated merely because some portions are found to be unconstitutional. This argument is unpersuasive. The injunction and closing order provisions represent a vital part of the statutory scheme. To eliminate these enforcement provisions would essentially eviscerate the statute and "would create a program quite different from the one the [people] actually adopted." Sloan v. Lemon, 413 U.S. 825, 834, 93 S.Ct. 2982, 2987, 37 L.Ed.2d 939 (1973). This we decline to do. That the statute contains a severability clause, Wash. Rev. Code § 7.48.900, does not authorize us to indulge in major revisions to salvage the statute. Id. at 833-34, 93 S.Ct. at 2987. We are certain that the legislature of the State of Washington can dc this better than we.

Affirmed.

Chapter 7.48

NUISANCES

Sections

7.48.050 Moral nuisances--Definitions.
7.48.052 Moral nuisances.
7.48.054 Moral nuisance--Personal property--Effects of notice.
7.48.056 Abate moral nuisance--Enjoin owner.
7.48.058 Maintaining action to abate moral nuisance--Bond.
7.48.060 Moral nuisance--Jurisdiction--Filing a complaint.
7.48.062 Moral nuisance--Restraining orders--Violations.
7.48.064 Moral nuisance--Hearing--Notice--Consolidation with trial.
7.48.066 Finding of moral nuisance--Orders.
7.48.068 Abatement of moral nuisance by owner--Effect on injunction.
7.48.070 Moral nuisance--Priority of action on calendar.
7.48.072 Moral nuisance--Effects of admission or finding of guilt.
7.48.074 Moral nuisance--Evidence of reputation--Admissibility.
7.48.076 Moral nuisance--Trial--Costs--Dismissal--Judgment.
7.48.078 Moral nuisance--Judgment--Penalties--Disposal of personal property.
7.48.080 Moral nuisance--Contempt for violation of injunction.
7.48.085 Moral nuisance--Property owner may repossess.
7.48.090 Moral nuisance--Contraband--Forfeitures.

7.48.100 Moral nuisance--Immunity of certain motion picture theatre employees.
7.48.900 Severability--Initiative Measure No. 335.

7.48.050 Moral nuisances--Definitions. The definitions set forth in this section shall apply throughout this chapter as they relate to moral nuisances.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Moral nuisance" means a nuisance which is injurious to public morals.

(6) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(7) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(8) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [Initiative Measure No. 335 § 1 (Approve November 8, 1977); 1913 c 127 § 1; RRS § 946-1.]

7.48.052 Moral nuisances. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or posessed for such purpose at a place which is a moral nuisance under this section;

(4) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a moral nuisance under this section;

(6) Every place which, as a regular course of business, is used for the purpose of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution are conducted, permitted, carried on, continued, or exist;

(7) All public houses or places of resort where illegal gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, illegal gambling, fighting, or breaches of the peace are carried on or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted. [Initiative Measure No. 335 § 2 (Approved November 8, 1977).]

7.48.054 Moral nuisance--Personal property--Effects of notice. The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance;

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance;

(3) The furniture, fixtures, and contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the applciation for a preliminary injunction, provided for in RCW 7.48.064, upon the place or its manager, acting manager, or person then in charge, all such persons are deemed to have knowledge of the acts, conditions, or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [Initiative Measure No. 335 § 3 (Approved November 8, 1977).]

7.48.056 Abate moral nuisance--Enjoin owner. In addition to any other remedy provided by law, any act, occupation, structure, or thing which is a moral nuisance may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing, may be enjoined as provided in this chapter. [Initiative Measure No. 335 § 4 (Approved November 8, 1977).]

7.48.058 Maintaining action to abate moral nuisance--Bond. The attorney general, prosecuting attorney, city attorney, city prosecutor, or any citizen of the county may maintain an action of an equitable nature in the name of the state of Washington upon the relation of such attorney general, prosecuting attorney, city attorney, city prosecutor, or citizen, to abate a moral nuisance, to perpetually enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, and the court finds there was no reasonable grounds or cause for said action and the case is dismissed for that reason before trial or for want of prosecution. No bond shall be required of the attorney general, prosecuting attorney, city attorney, or city prosecutor, and no action shall be maintained against such public official for his official action when brought in good faith. [Initiative Measure No. 335 § 5 (Approved November 8, 1977).]

7.48.060 Moral nuisance--Jurisdiction--Filing a complaint. The action provided for in RCW 7.48.058 shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified

complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten days after the filing. [Initiative Measure No. 335 § 6 (Approved November 8, 1977); 1913 c 127 § 2; RRS § 946-2.]

7.48.062 Moral nuisance--Restraining order--Violations. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect. [Initiative Measure No. 335 § 7 (Approved November 8, 1977).]

7.48.064 Moral nuisance--Hearing--Notice--Consolidation with trial. A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least three days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in RCW 7.48.062 in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [Initiative Measure No. 335 § 8 (Approved November 8, 1977).]

7.48.066 Finding of moral nuisance --Orders. If upon hearing, the allegations of the complaint are sustained to

the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control of, or in charge of the nuisance so enjoined had received three days notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein, and shall forthwith issue an order closing such place against its use for any purpose until a final decision is rendered on the application for a permanent injunction, unless:

(1) The person owning, in control of, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person; or

(2) The owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by RCW 7.48.085.

Such order shall also continue in effect for such further period as the order authorized in RCW 7.48.062 provided. If no order has been issued pursuant to RCW 7.48.062, then an order restraining the removal or interference with the personal property and contents located therein shall be issued. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in RCW 7.48.062.

Such order shall also require such persons to show cause within thirty days why such closing order should not be made permanent, as provided for in RCW 7.48.078. [Initiative Measure No. 335 § 9 (Approved November 8, 1977).]

7.48.068 Abatement of moral nuisance by owner--Effect on injunction. The owner of any real or personal property to be closed or restrained, or which has been closed or restrained, may appear after the filing of the complaint and before the hearing on the application for a permanent injunction.

The court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of its use as a nuisance, and that with reasonable care and diligence such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall cancel said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property under this section shall not release it

from any judgment, lien, penalty, or liability to which it may be subjected by law. [Initiative Measure No. 335 § 10 (Approved November 8, 1977).]

7.48.070 Moral nuisance--Priority of action on calendar. The action provided for in RCW 7.48.058 shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [Initiative Measure No. 335 § 11 (Approved November 8, 1977); 1913 c 127 § 3; RRS § 946-3.]

7.48.072 Moral nuisance--Effects of admission or finding of guilt. In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place is admissible for the purpose of proving the existence of such nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining such nuisance. [Initiative Measure No. 335 § 12 (Approved November 8, 1977).]

7.48.074 Moral nuisance--Evidence of reputation--Admissibility. At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [Initiative Measure No. 335 § 13 (Approved November 8, 1977).]

7.48.076 Moral nuisance--Trial--Costs--Dismissal--Judgment. If the action is brought by a person who is a

citizen of the county, and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed before trial for that reason or for want of prosecution, the costs, including attorney's fees, may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere. The entire expenses of such abatement, including attorney's fees, shall be recoverable by the plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a person who is a citizen of the county, it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action should not be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued for more than one term of court, any person who is a citizen of the county or has an office therein, or the attorney general, the prosecuting attorney, city attorney, or city prosecutor, may be substituted for the complainant and prosecute said action to judgment. [Initiative Measure No. 335 § 14 (Approved November 8, 1977).]

7.48.078 Moral nuisance--Judgment--Penalties--Disposal of personal property. If the existence of a nuisance is admitted or established in an action as provided for in RCW 7.48.058 or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and not already released under authority of the court as provided for in RCW 7.48.066 and 7.48.068, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and shall not be sold.

Such judgment shall impose a penalty of three hundred dollars for the maintenance of such nuisance, which penalty shall be imposed against the person or persons found to have maintained the nuisance, and, in case any owner or agent of the building found to have had actual or constructive notice of the maintenance of such nuisance, against such owner or agent, and against the building kept or used for the purposes of maintaining a moral nuisance, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of the county in which the judgment is had.

Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in RCW 7.48.068 or, if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued,

shall include an order directing the effectual closing of the place against its use for any purpose and keeping it closed for a period of one year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in RCW 7.48.068.

Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made, and prove innocence to the satisfaction of the court of any knowledge of such use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [Initiative Measure No. 335 § 15 (Approved November 8, 1977).]

7.48.080 Moral nuisance--Contempt for violation of injunction. In case of the violation of any injunction granted under the provisions of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged

facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three not more than six months, or by both fine and imprisonment. [Initiative Measure No. 335 § 16 (Approved November 8, 1977); 1913 c 127 § 4; RRS § 946-4.]

7.48.085 Moral nuisance--Property owner may reposses. If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of maintaining a moral nuisance, such use makes void at the option of the owner the lease or other title under which he holds, and without any act of the owner causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [Initiative Measure No. 335 § 17 (Approved November 8, 1977).]

7.48.090 Moral nuisance--Contraband--Forfeitures. Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in RCW 7.48.052 and 7.48.054 and all moneys and other consideration declared to be a moral nuisance under RCW 7.48.056 are the subject of forfeiture to the local government and are recoverable as damages in the county

wherein such matter is sold, exhibited, or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under RCW 7.48.064, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals.

Where the action is brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) Investigative costs;

(2) Court costs;

(3) Reasonable attorney's fees arising out of the preparation for and trial of the cause, appeals therefrom, and other costs allowed on appeal;

(4) Printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [Initiative

Measure No. 335 § 18 (Approved November 8, 1977); 1927 c 94 § 1; 1913 c 127 § 5; RRS § 946-5.]

7.48.100 Moral nuisance--Immunity of certain motion picture theatre employees. The provisions of any criminal statutes with respect to the exhitition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, if such projectionist, usher, or ticket taker (1) has no financial interest in the place wherein he is so employed, other than his salary, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under RCW 7.48.050 through 7.48.100 as now or hereafter amended, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [Initiative Measure No. 335 § 19 (Approved November 8, 1977); 1927 c 94 § 2; 1913 c 127 § 6; RRS § 946-6.]

7.48.900 Severability--Initiative Measure No. 335. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected. [Initiative Measure No. 335 § 20 (Approved November 8, 1977).]

FILED

December 16, 1980

RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE ARCADES, INC., a Washton Corporation; PLAYTIME THEATRES, INC., A Washington Corporation; J-R DISTRIBUTORS, INC., A Washington Corporation; and SPORTLAND AMUSEMENT, INC., A Washington Corporation,	No.78-2369 No.78-2520
Plaintiffs-Appellees,	ORDER
v.	
DONALD C. BROCKETT, Prosecuting Attorney, etc.,	
Defendants-Appellants,	
and	
THE HONORABLE DIXIE LEE RAY, As Governor of the State of Washington, et al.,	
Defendants.	

Before: KILKENNY and SNEED, Circuit Judges, and CALLISTER*, District Judge

*Honorable Marion J. Callister, United States District Judge for the District of Idaho, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

RECEIVED
RICHARD H. DEANE
Clerk, U.S.Court of Appeals

FEB 9, 1981
Filed 2/9/81 pn

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE ARCADES, INC., a Washton Corporation; PLAYTIME THEATRES, INC., A Washington Corporation; J-R DISTRIBUTORS, INC., A Washington Corporation; and SPORTLAND AMUSEMENT, INC., A Washington Corporation,	No.78-2369 D. C. No. C-77-353
Plaintiffs-Appellees,	
v.	NOTICE OF APPEAL
DONALD C. BROCKETT, Prosecuting Attorney, etc.,	
Defendants-Appellants,	
and	
THE HONORABLE DIXIE LEE RAY, As Governor of the State of Washington, et al.,	
Defendants.	

Notice is hereby given that Donald C. Brockett, the defendant abovenamed, hereby appeals to the Supreme Court of the United States from the final Judgment and Opinion affirming the District Court entered in this action on

October 23, 1980, a Petition for Rehearing having been denied on December 16, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

/s/ Donald C. Brockett
Counsel for defendant

Office-Supreme Court, U.S.
FILED
JUN 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1604

In the

Supreme Court of the United States

October Term, 1980

SPOKANE ARCADES, INC., A Washington Corp.; PLAYTIME THEATRES, INC., A Washington Corp.; J-R DISTRIBUTORS, INC., A Washington Corp.; and SPORTLAND AMUSEMENT, INC., A Washington Corp.;

PLAINTIFFS–APPELLEES

v.

DONALD C. BROCKETT, Prosecuting Attorney in his representative capacity only;

DEFENDANT–APPELLANT

and

THE HONORABLE DIXIE LEE RAY, as Governor of the State of Washington in her representative capacity only; HONORABLE BRUCE K. CHAPMAN, Secretary of State of Washington, in his representative capacity only; HONORABLE SLADE GORTON, as Attorney General of the State of Washington, in his representative capacity only;

DEFENDANTS

On Appeal from the
Ninth Circuit Court of Appeals

Supplemental Brief

DONALD C. BROCKETT
Spokane County Prosecutor
Spokane, Washington 99260
(509) 456-3662

No. 80-1604

In the Supreme Court of the United States

OCTOBER TERM, 1980

SPOKANE ARCADES, INC., A Washington Corp.; PLAYTIME THEATRES, INC., A Washington Corp.; J-R DISTRIBUTORS, INC., A Washington Corp.; and SPORTLAND AMUSEMENT, INC., A Washington Corp.;

PLAINTIFFS–APPELLEES

v.

DONALD C. BROCKETT, Prosecuting Attorney in his representative capacity only;

DEFENDANT–APPELLANT

and

THE HONORABLE DIXIE LEE RAY, as Governor of the State of Washington in her representative capacity only; HONORABLE BRUCE K. CHAPMAN, Secretary of State of Washington, in his representative capacity only; HONORABLE SLADE GORTON, as Attorney General of the State of Washington, in his representative capacity only;

DEFENDANTS

On Appeal from the Ninth Circuit Court of Appeals

Supplemental Brief

COMES NOW the Spokane County Prosecutor respectfully requesting leave to file a Supplemental Brief pursuant to Supreme Court Rules, Rule 16.6, the substance of

which includes a copy of the recent Idaho Supreme Court decision, Idaho, ex rel. v. U.S. Marketing, Inc., et al., which is attached hereto as Appendix A and incorporated herein by reference.

This request is necessary because the Idaho decision has a substantial impact on Appellant's appeal herein, in that the opinion, in construing a statute very similar to the one in issue here, held:

1. Idaho Code §§52-406 and 412, allowing for a one-year forfeiture or closure of the physical premises and real property used for the distribution of materials adjudicated to be obscene, does not by itself constitute an unlawful prior restraint upon the exercise of free speech.

2. An award of attorney fees and statement costs awarded to defendants who were dismissed from the case was improperly granted and is set aside.

3. The trial court's award of attorney fees and abatement costs

pursuant to Idaho Code § 52-415 (allowing the prosecuting agency to recover such costs) was insufficient.

4. Idaho Code § 52-415 is not violative of the equal protection clause because it awards abatement costs only to a prevailing plaintiff.

Appellant has been informed by the Clerk's Office that the time allowed for the filing of the motion to dismiss or affirm in Spokane Arcades, Inc. et al., has been extended to and including June 13, 1981, and therefore, the filing of the within Brief is timely.

CERTIFICATE OF SERVICE

I, hereby certify that on this th day of June 1981 three copies of the Supplemental Brief of Appellant were mailed postage prepaid to:

ROBERT EUGENE SMITH, ESQ.
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9055 La Tuna Canyon Road
Sun Valley, California 91352

I further certify that all parties required to be served have been served.

DONALD C. BROCKETT
Spokane Prosecuting Attorney
Counsel For Appellant

APPENDIX A

(Reference: Supplemental Brief at page 1.

OPINION OF THE IDAHO SUPREME COURT IN STATE OF IDAHO EX REL. KIDWELL ET AL. V. U.S. MARKETING, INC., AND NIKS AND NAKS ADULT BOOKSTORE, ET AL., (May 29, 1981)

.....A-1 thru A-34

1981 Opinion No. 67

IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 12867 & 12910

STATE OF IDAHO, ex rel. WAYNE L. KIDWELL, ATTORNEY GENERAL; and DAVID H. LEROY, ADA COUNTY PROSECUTING ATTORNEY, Plaintiff-appellants, Cross respondents, v. U.S. Marketing, Inc., an Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1; LAMAR LARSEN, Manager and Property Incorporator, JEAN LARSEN, Manager; DON COSSETTE; TOM SHAW, Owner and Incorporator; DAVID BURTON, Clerk; JERRY VAN CAMP, JOHN M. SOUTHWORTH, Individually, and as Contract Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10, Defendant-Respondents, Cross appellants, and NIKS & NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd., Garden City, County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres Subdivision #1; ROBERT S. LOYA, Owner;	)	Boise term, February 1981 Filed: May 19, 1981 R.H. Young, Clerk

JOSEPH E. OSCO, BETTY OSCO, Owner, Managers; MELVIN WINN, Clerk: CECIL ANDREW JOHNSON, Jr., and HELEN M. HANSON, Property owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendant-respondents, Cross appellants.

STATE OF IDAHO, ex rel. Wayne L. KIDWELL, ATTORNEY GENERAL; and DAVID H. LEROY, ADA COUNTY PROSECUTING ATTORNEY,

Plaintiff-respondents, Cross appellants,

v.

U.S. MARKETING, INC., an Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1, County of Ada, State of Idaho; LAMAR LARSEN, Manager and Property Incorporator; JEAN LARSEN, Manager; DAN COSSETTE; TOM SHAW, Owner and Incorporator; DAVID BURTON, Clerk,

Defendant-appellants, Cross respondents,

and

JERRY VAN CAMP, JOHN M. SOUTHWORTH, Individually, and

as Contract Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendants,

and

NIKS AND NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd., Garden City, County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres subdivision #1; ROBERT S. LOYA, Owner; JOSEPH E. OSCO and BETTY OSCO, Owner-managers; MELVIN WINN, Clerk,

Defendants-appellants, Cross respondents,

and

CECIL ANDREW JOHNSON, JR., and HELEN M. HANSON, Property Owners; JOHN DOE #1, Arcade Machine Owners or Lessors; JOHN DOE #2, Security Interest Holder; JOHN DOES #3-10,

Defendants.

Consolidated appeals from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. W.E. Smith, District Judge.

Appeal by state from district court

order declaring statutory nuisance provision unconstitutional; appeal by all parties from district court's award of costs and attorney fees. Reversed.

David H. Leroy, Attorney General, and Timothy M. Walton, Deputy Attorney General, Boise, Idaho, for the State of Idaho.

David W. Cantrill, of Cantrill & Green, Boise, Idaho, for Niks and Naks Adult Bookstore, et al.; and William J. Tway, of Tway & Tway, Boise, Idaho, for U.S. Marketing, Inc., et al.

BAKES, C.J.

The state commenced this action against two Garden City adult bookstores under the provisions of the Idaho Moral Nuisance Abatement Act. I.C. §§52-401, et seq. Named as defendants were two business entities, U.S. Marketing, Inc., and Niks & Naks Adult Bookstore; their managers, owners, officers and incorporators; and those individuals who owned the two parcels of property upon which the bookstores were located.

The state sought to have some of defendants' films and publications declared obscene. The state asked for injunctive relief abating the alleged nuisance; a one-year forfeiture of the use of the real property in question; and an award of the costs of abatement including, but not limited to, investigative costs, court costs and attorney fees. The state also requested other relief not relevant on appeal.

Responding to a motion to dismiss, the trial judge disposed of several threshold constitutional issues. The judge held that nuisance abatement proceedings are a proper and constitutional method of attempting to control the sale and distribution of obscene materials. He concluded that the defendants could be enjoined from further sale and distribution of those materials adjudicated to be obscene. However, the

judge held that those statutory provisions which permit any forfeiture or closure of the physical premises and real property, see I.C. §§52-406 and -412, constitute an unlawful "prior restraint" on free speech and a violation of due process.

The owners of the two parcels of property in question were then dismissed from the lawsuit. Two of those individuals, defendant respondents Cecil Johnson and Helen Hanson, lease their property to Niks & Naks. Johnson and Hanson were dismissed presumably because the remedies available against the real property were held to be unconstitutional. After granting the motion to dismiss, the trial judge awarded costs and attorney fees to Johnson and Hanson. The state objected to the award below and raises that issue again on appeal.

A trial on the merits was held before the district judge, who found that the

majority of the exhibits introduced by the state were obscene. The court entered judgment accordingly and enjoined the remaining defendants from further sale and/or exhibition of any of the materials found obscene.

The state then attempted to collect the "costs of abatement" pursuant to I.C. §52-415. The trial court awarded the state only a limited amount for attorney fees, stating, among other things, that the state's attorneys did not keep adequate hourly time records.

The state appeals, contending (1) that the one-year forfeiture or closure order sought by the state is not an unconstitutional prior restraint upon free speech; (2) that the trial court's reduced award for abatement costs against the remaining defendants was in error; and (3) that it was error for the court to grant costs and attorney fees to dismissed

defendants Hanson and Johnson. The trial defendants cross-appealed, alleging that the state was not entitled to any abatement costs.

I

Before turning to the merits, it is essential that we articulate the limited context in which defendants' first amendment claim comes to this Court. The sole constitutional question presented in this appeal is whether a district court may impose a one-year forfeiture of the use of real property upon a finding, made pursuant to constitutionally acceptable procedures, that obscene materials were disseminated on the property. Defendant respondents contend that such a closure order or forfeiture constitutes an unlawful prior restraint upon the exercise of free speech insofar as it affects materials not determined to be obscene. We disagree for reasons set forth later in

this opinion.

The defendants do not, however, contest the lower court's finding of obscenity. Nor do they contest the standards which the lower court applied in making that determination. See Miller v. California, 413 U.S. 15 (1973). The fact of obscenity is therefore not an issue in this appeal.

More importantly, this appeal involves no procedural issues. The United States Supreme Court has imposed a number of procedural requirements upon the states' efforts to regulate dissemination

of sexually oriented materials.[1] See Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980); Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). Idaho's moral nuisance statutes, I.C. §§52-401 et seq., contain a relatively extensive and rather complex procedural blueprint for nuisance actions of this type. For purposes of this appeal, we need only observe that the nuisance statutes do not provide for or allow any restraint upon dissemination

[1] According to the Court, there are three fundamental procedural requirements which must be met prior to the imposition of any restrain upon the dissemination of obscenity. "First, the burden of institutin judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975). See L. Tribe, American Constitutional Law §12-36, at 734-36 (1978). The appellants have not alleged that any of the above requirements were not met.

prior to a judicial determination of obscenity. See State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911, 914 (Ohio 1974), dismissed for want of substantial federal question sub nom. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

We stress the limited scope of this appeal because the United States Court of Appeals for the Ninth Circuit has recently struck down, on procedural grounds, certain Washington moral nuisance statutes identical to Idaho's. Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980). The Ninth Circuit did not reach the issue presented by the instant appeal,[2] nor has, to our knowledge, any

[2] "The ability of a court to close a place temporarily because obscene materials may have been sold, distributed, or exhibited on the premises is an impermissible prior restraint. We express no opinion with respect to what circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment." Spokane Arcades, Inc. v. Brockett, 631 F.2d at 139.

United States Supreme Court case.[3] By the same token, we do not reach those procedural issues resolved in Spokane Arcades.[4]

II

In the last few decades, the Supreme Court of the United States has often

[3] In its most recent obscenity case, Vance v. Universal Amusement Co., Inc., 455 U.S. 308 (1980), the Supreme Court came close to, but did not decide, the issue presented by this appeal. In Vance, the Court examined the constutitutionality of certain Texas nuisance abatement statutes. Although the Texas statutes did contain a one-year closure provision, the Fifth Circuit Court of Appeals construed that provision to apply only to certain common nuisances such as gambling and prostitution. On appeal, the Supreme Court accepted the Fifth Circuit's construction. It was therefore unnecessary for the Court to determine whether a one-year closure order could be imposed in an obscenity nuisance action.

Although the Supreme Court has never expressly confronted this issue, it may nonetheless have implicitly approved of one-year closure orders in obscenity cases. See State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), dismissed for want of substantial federal question sub nom. Art Guild Theatre, Inc. v. Ewing, 421 U.S. 923 (1975). The significance of that decision will be discussed later in the opinion.

[4] Our citation to the Spokane Arcades case should by no means be equated with approval. Indeed, it appears that the Spokane Arcades panel made little effort to construe Washington's

spoken to the issue of obscenity and the first amendment. Several fundamental principles have emerged. First, and perhaps foremost, obscenity is not protected by the first amendment. E.g., Paris Adult Theater I v. Slayton, 413 U.S. 49 (1973); Miller v. California, 413 U.S.

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statute in a constitutional manner. For example, in holding that the Washington nuisance abatement statutes were procedurally deficient, the panel listed four supposed defects, without once considering any alternative constitutional constructions. A statute must be construed in a constitutional sense where reasonable and practicable to do so. U.S. Civil Service Commission v. Natl. Ass'n of Letter Carriers, 413 U.S. 548 (1973); United State v. Vuitch, 402 U.S. 62 (1971); State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979). It seems clear that some, if not all, of the purported procedural defects identified in Spokane Arcades may be cured by appropriate construction. See United States v. 37 Photographs, 402 U.S. 363 (1971); Grove Press, Inc. v. Flask, 326 F.Supp. 574 (N.D.Ohio 1970), vacated 413 U.S. 902 (1973); General Corp. v. State ex rel. Sweeton, 320 So.2d 668(Ala. 1975), cert. denied 524 U.S. 904 (1976); State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), dismissed for want of a substantial federal question sub nom. Art Guild Theatre, Inc. v. Ewing, 421 U.S. 923 (1975). In fact, the record in this case reflects that the district court avoided some procedural problems by imposing appropriate savings constructions upon the Idaho nuisance statutes. Therefore, the Spokane Arcades decision may not be entitled to great precedential value.

15 (1973). Hence, the states have considerable leeway in attempting to regulate the dissemination of sexually explicit materials which are obscene.

> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choise." Kingsley Books v. Brown, 354 U.S. at 441.

It is also clear that the states have the power to punish purveyors of illegal pornography. Roth v. United States, 354 U.S. 476 (1957); Smith v. People, 361 U.S.

147 (1959).[5] However, while punishment after the fact is permissible, courts have exhibited a marked dislike for restraining even unprotected obscenity prior to its dissemination. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[6] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). See Vance v. Universal Amusement Co., Inc., supra. Prior restraints upon

[5] In Smith, the Supreme Court required some form of scienter as an element of proof in a criminal obscenity prosecution. Other courts have construed the Smith ruling to require proof of scienter in civil obscenity actions of a punitive nature. Grove Press, Inc. v. Flask, supra; State ex rel. Ewing v. "Without a Stitch," supra. That issue was not raised on this appeal, and thus we do not decide it.

[6] "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 558-59.

expression are not absolutely prohibited, however, and, as long as certain procedural safeguards are employed, obscene expression may be enjoined. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books v. Brown. See note 1, supra.

While much has been written on procedural requirements in cases involving "prior restraint," very little has been written to define the phrase. To merely label something unconstitutional as a prior restraint is question begging at its best, especially if no analytical effort is made to determine whether the regulation is indeed a prior restraint on free speech.

> "The phrase 'prior restraint' is not a selfwielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who

> brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539." Kingsley Books v. Brown, 354 U.S. at 441-42.

By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities. If that same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite

clear that it has that effect.[7]

At the other end of the spectrum is the type of direct restraint found in the always-cited landmark case of Near v. Minnesota, 283 U.S. 697 (1931). The State of Minnesota had commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish

[7] In upholding a similar one-year closure provision, a Michigan court remarked,

> "Persons convicted of violating this state's criminal obscenity law ... are subject to imprisonment for a period of time not to exceed one year. No one could seriously argue that the statute, insofar as it provides for imprisonment, constitutes a prior restraint on a person's first amendment rights simply because during the period of incarceration that person could not show movies he otherwise might have. We can see no difference here, particularly in light of the fact that a sanction less severe than a deprivation of personal liberty is involved.' State ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d 389, 396 (Mich.App. 1975) (citations omitted), rev'd on other grounds, 240 N.W.2d 460 (Mich. 1976).

a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an inpermissible prior restraint. The Court placed much emphasis on the fact that the object of the Minnesota statute was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the least of which is the fact that Near dealt with speech critical of public officials rather

than speech of a sexual nature. Most significantly, however, the Near injunction against prospective publication was based on the content of such publication. In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression.[8]

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. ... The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide

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[8] The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

> open.'" Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.)

The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particularly noxious specter of content control. Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead, the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation.

The state's authority to impose property related sanctions in civil

actions is well established. In modern times, the most prevalent example of this type of in rem action can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs. E.g., 21 U.S.C. §881(a); 49 U.S.C. §§781, 782; I.C. §37-2744. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Forfeiture is not limited to property used in drug crimes, however. "[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 683. See State v. 36 Pinball Machines, 565 P.2d 236 (Kans. 1977). In Calreo-Toledo, the Supreme Court of the United States upheld a long line of prior decisions which held that forfeiture statutes, although admittedly harsh, do not impose an

unconstitutional taking of property without just compensation, even though the property itself is capable of innocent use, and even though the forfeiture may enmesh the property interests of innocent owners, lessors, lenders, bailors or secured creditors. The government's authority to impose a forfeiture extends even to real property. See United States v. Stowell, 133 U.S. 1 (1890); Dobbin's Distillery v. United States, 96 U.S. 395 (1878); 26 U.S.C. §5615(3) (imposing forfeiture of real property upon which unlawful distillery is operated).

The purpose of statutory forfeitures is obvious: to punish and to deter. As the Calero-Toledo Court observed, statutory forfeitures punish "by imposing an economic penalty, thereby rendering illegal behavior unprofitable." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 687. That is the manifest purpose

of Idaho's one-year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means.

The state's position in this case is further buttressed by reference to two other Supreme Court cases. The first is Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975), which dismissed an appeal from State ex rel. Ewing v. "Without a Stitch," 307 N.E.2d 911 (Ohio 1974), for want of a substantial federal question. The Ohio Supreme Court had ruled that a one-year closure provision much like Idaho's was a constitutionally permissible method of controlling obscenity. The Supreme Court's subsequent dismissal is significant. As the case of Hicks v. Miranda, 422 U.S. 332 (1975), makes clear, a dismissal for want of substantial federal

question must be considered a ruling on the merits by the United States Supreme Court. Thus, the high Court has placed its implicit imprimatur on a nuisance clause provision virtually identical to Idaho's, thereby refuting defendants' contention that imposition of any closure order constitutes an unlawful prior restraint.

The second case is Young v. American Mini Theatres, 427 U.S. 50 (1976). In Young, the Court held that local governments may regulate obscenity by zoning laws. The Court specifically held that a zoning ordinance which imposed a licensing requirement upon adult motion picture theaters did not constitute an impermissible prior restraint upon free speech. The Court remarked:

> "The ordinances are not challenged on the grounds that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that

> distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." Id. at 62 (emphasis added).

The Court's reasoning applies to the instant case. The defendants are not denied access to the market, nor are they absolutely restrained from selling any sexually explicit materials other than those specifically adjudicated to be obscene. The closure order imposes as a sanction only a temporary forfeiture on a specific piece of property found to be directly related to past violations of obscenity law. Like the theater owners in Young, the defendants in this case are free to conduct their business elsewhere. [9]

[9] Other courts have relied upon this fact in upholding similar closure provisions.

> "Defendants' arguments in this regard fail to recognize ... that the sanctions of the statute are imposed, after a full hearing in court, because of past exhibitions and not

We therefore conclude that, under the circumstances of this case, a one-year closure or forfeiture order does not by itself constitute an unlawful prior restraint upon the exercise of free

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because of past exhibitions and not because of what may or may not be shown in the future. Indeed, the sanctions imposed by the statute do not restrict the right of defendants herein to legally exhibit films not yet declared obscene. The sanctions simply prohibit the defendants from doing so in these particular buildings. The statute simply imposes a sanction for past acts and affects the right of the owners and operators to exhibit future films only insofar as it precluded them from doing so in these buildings." State ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d at 396.

"[W]hile appellants are arguably denied their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place." People ex rel. Hicks v. "Sarong Gals," 117 Cal.Rptr. 24, 28 (Cal.App. 1974). See also People ex rel. Sorenson v. Randolph, 160 Cal.Rptr. 69 (Cal.App. 1979).

speech.[10] Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at any speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials, except those already determined

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[10] We come to this conclusion fully aware that a number of states have held that closure provisions constitute improper prior restraints. General Corp. v. State ex rel. Sweeton, 320 So.2d 668 (Ala. 1975), cert. denied 425 U.S. 904 (1976); People ex rel. Busch v. Projection Room Theatre, 550 P.2d 600 (Cal. 1976), cert. denied 429 U.S. 922 (1976); Sanders v. State, 203 S.E.2d 153 (Ga. 1974); State v. A Motion Picture Entitled "The Bet," 547 P.2d 760 (Kans. 1976); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So.2d 480 (La. 1973); State ex rel. Andrews v. Chateau X, Inc., 250 S.E.2d 603 (N.C. 1979), vacated 445 U.S. 947 (1980).

to be obscene, at any other location, subject of course to further penal actions by the state should the defendants again violate laws regulating obscenity. Again, our conclusion is premised on the fact that, as shown by the record below, the one-year closure would be imposed only after a judicial determination of obscenity made pursuant to constitutionally acceptable procedures.

III

The remaining issues relate to attorney fees and abatement costs. Defendants Hanson and Johnson, owners and lessors of the Niks & Naks property, were awarded attorney fees as prevailing parties after they were dismissed from the case due to the lower court's ruling on the constitutional issue. Today's opinion reverses that ruling, and thus at this point Hanson and Johnson are no longer prevailing parties. Therefore, that award

is set aside. Any award of attorney fees to either party must await the final outcome of this case on remand.

The state also contends that the trial court's award of attorney fees and abatement costs pursuant to I.C. §52-415 was insufficient. We agree for several reasons.

Firstly, although several other moral nuisance provisions may be penal in nature, the provision relating to recovery of abatement costs, I.C. §52-415, is clearly remedial. As such, it should be liberally construed with a view to effect its manifest objectives. E.g., Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P.2d 63 (1969). See I.C. §73-102.

Secondly, the court below denied the state virtually all of its request for attorney fees on the grounds that it did not keep hourly time records. The introduction of hourly time sheets into

evidence is not a prerequisite to an award of reasonable attorney fees. See Realty West, Inc. v. Thomas, 95 Idaho 262, 506 P.2d 830 (1973); Dykstra v. Dykstra, 94 Idaho 797, 498 P.2d 1270 (1972). Cf. I.R.C.P. 54(e)(3) (amount of time spent is but one of several factors to be considered in awarding attorney fees). I.C. §52-415 contains a clear legislative directive that obscene materials are to be abated. Upon entry of judgment against defendants in legal proceedings brought pursuant to the moral nuisance statutes, not only are the gross profits ("the fruits of [the] unlawful enterprise") to be forfeited, but also the full costs of abatement, including but not limited to investigative costs, court costs, reasonable attorney fees, and costs on appeal, are to be charged to the defendants against whom a judgment is entered. The trial court's nominal award

of attorney fees, and denial of other abatement costs including investigative costs, printing costs, and the like, is not in keeping with the legislative policy set out in I.C. §52-415.

The trial defendants argue that the state should not be awarded any attorney fees. They maintain that the state accrued no fees, inasmuch as it was represented by staff attorneys. That argument has been previously rejected by this court. James v. Dunlap (In re Dunmire), 100 Idaho 697, 604 P.2d 711 (1979). See Futrell v. Martin, 100 Idaho 473, 600 P.2d 777 (1979).

The trial defendants also contend that I.C. §52-415 violates the equal protection clause because it awards abatement costs only to a prevailing plaintiff. A statute providing an award of attorney fees only to the prevailing plaintiff does not violate equal

protection principles where, as here, the award furthers a legitimate governmental objective. See Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978); Harrington v. McCarthy, 91 Idaho 307, 420 P.2d 790 (1966); Hindman v. Oregon Short Line RR. Co., 32 Idaho 133, 178 P. 837 (1918). See generally, Annot., 73 A.L.R.3d 515 (1976).

The judgment of the district court is therefore reversed and remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiff State of Idaho against all defendants. Attorney fees on appeal are awarded pursuant to I.C. §52-415 to the State of Idaho against all defendant appellants.

McFADDEN, BISTLINE AND DONALDSON, JJ., concur.

SHEPARD, J., concurring in part and dissenting in part.

I concur with the majority opinion except that portion whereof in which the trial court's award of attorney's fees and abatement costs is ruled insufficient and reversed presumably for the award of additional attorney's fees and abatement costs. As indicated by the majority opinion, a portion of the trial court's ruling appears to be that the State prevailed only as to a portion of its entire case. Hence, I would believe that I.R.C.P. 54(e)(1) as it relates to a trial court's determination of the "prevailing party" in accordance with I.R.C.P. 54(d)(1) constitutes sufficient authority upon which to uphold the trial court's ruling.

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NO. 80-1604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SPOKANE ARCADES, INC., A Washington Corp.;
PLAYTIME THEATRES, INC., A Washington Corp.;
J-R DISTRIBUTORS, INC., A Washington Corp.; and
SPORTLAND AMUSEMENT, INC., A Washington Corp.;
Plaintiffs-Appellees,

vs.

DONALD C. BROCKETT,
Prosecuting Attorney in his representative capacity only;
Defendant-Appellant.

MOTION TO AFFIRM

ON APPEAL FROM THE NINTH CIRCUIT
COURT OF APPEALS

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I

GROUNDS FOR AFFIRMATION

The judgment of the United States Court of Appeals for the Ninth Circuit, 631 F.2d. 135 (July 10, 1980) for which review is sought by the jurisdiction statement filed by Donald Brockett, Prosecuting Attorney in his capacity only as a prosecutor for Spokane County, State of Washington, should be affirmed, pursuant to *Rule 16* of the *Rules of the Supreme Court of the United States* for the following reasons:

1. Donald Brockett, an individual prosecutor, has not been joined in his appeal by the necessary and indispensable parties to wit: representatives of the State of Washington, who after the ruling and order by the Ninth Circuit have accepted said ruling which relates to a statute of statewide application and are being governed accordingly. Brockett, during the pendency of the appeal in the Ninth Circuit on two (2) separate occasions sought relief in this Court pursuant to *Rule 18* alleging that "the case is os such imperative importance as to justify the deviation from normal appellate practices and to require immediate settlement in this Court." On both occasions the Petition from Writ of Certiorari was denied. Because of the lack of the necessary and irresponsible party (i.e. the Attorney General of the State of Washington who has abandoned further appeals) the judgement should be affirmed.

2. Appellant, Brockett, a local county prosecutor, in his jurisdictional statement filed in this Court, has failed to disclose by his "initial pleading, motion or paper" filed in the Supreme Court does not disclose or recite that 28 U.S.C. §2403(B) may be applicable and that copies of such recitation were affirmatively served on the Attorney General of the State of Washington as required by *Rule 28* of the Rules of this Court, and accordingly the judgment below should be affirmed per Rule 16.1(d) of the Rules of this Court.

3. That the issues presented by the jurisdictional statement in light of the holding of this Court in *Vanoe v. Universal Amusements Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) are so insubstantial as not to need further argument per Rule 16.1(c) of the Rules of this Court.

4. That the issues presented by the jurisdiction statement were correctly dealt with by both the trial court in 449 F.Sup. 1145 (E.D. Wash. 1978) and by the Ninth Circuit in 631 F.2d. 135, and as such, the same are so insubstantial as not to need further argument per Rule 16.1.1(c) of the Rules of this Court.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are listed in the caption. The only corporation of those listed which is affiliated, is Playtime Theatres, Inc.; its affiliated is Kuhio Bay Properties, Inc., a Washington Corporation.

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NO. 80-1604

IN THE

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SPOKANE ARCADES, INC., A Washington Corp.;
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MOTION TO AFFIRM

ON APPEAL FROM THE NINTH CIRCUIT
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II.

COUNSEL FOR PLAINTIFFS-APPELLEES HAVE NO ARGUMENT WITH THE RECITATION OF APPELLANT BROCKETT AS TO: *OPINIONS BELOW* *JURISDICTION* *STATUTORY PROVISIONS INVOLVED*

Counsel for Plaintiffs-Appellees do quarrel with certain aspects of the *STATEMENT OF THE CASE* as set forth by Appellant Brockett.

While it is true that a complaint was filed prior to the time period for certification with a request for a temporary restraining order with notice, the latter was denied and the initative was duly certified into law.

Judge Fitzgerald heard the Application for Preliminary and Permanent Injunction after the challenged statute was in full force and effect.

During oral argument, the Court inquired of Appellant Brockett if he intended to invoke the statute against the plaintiff in the absence of the pendency of the lawsuit to which he replied with an emphatic and vigorous "affirmative", the representative of the office of the Attorney General also assured the Court that their office would also seek to support the law and enforce it vigorously. For this reason, the Court concluded on the standing issue 449 F.Supp., *supra* at 1148, "it is to be expected that the State Attorney General and the county prosecutors at Washington will faithfully and energetically perform their duties under the law."

The balance of appellant *Brockett's Statement of the Case* is unchallenged as to accuracy.

III

THE STATEMENT OF REASONS FOR PLENARY REVISION HAVE BEEN FULLY CONSIDERED BY BOTH THE TRIAL COURT AND THE CIRCUIT COURT AND NEED NOT FURTHER TROUBLE THIS COURT AND THIS CASE SHOULD BE SUMMARILY DISPOSED OF UPON THE MERITS PURSUANT TO RULE 16.7 OF THE RULES OF THIS COURT.

A.

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

This argument was made and briefed to the trial judge and answered by him in 449 F.Supp. 1145 at pages 1149 to 1150, inclusive in the negative.

This argument was made and briefed to the three (3) judge appellate panel and unanimously answered by them at 6631 F.2d. 135 and page 137, again in the negative.

The Seventh Circuit in a case decided September 23, 1980 stated *Entertainment Concepts, Inc. v. Maciejewski, et al.*, 631 F.2d 497 held on the "case or controversy" question when dealing with issues within the penumbra of the First Amendment in pertinent part as follows:

"The concept of ripeness is founded in the constitutional requirement that there must be a 'case or controversy' before courts can act. That controversy must not be merely speculative; rather, it must be a concrete dispute between the parties "in order to avoid overstatement [and] to focus attention on a narrow problem.' Currie, Federal Courts 91 (1975).

"The requirement of concreteness, however, does not in and of itself require that the plaintiff be the subject of some administrative or judicial proceeding at the time of suit. The Supreme Court has often upheld the grant of injunctive relief against laws before prosecution. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) (pregnant woman and doctors allowed to challenge an anti-abortion law); *Eperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (no criminal charges pending against school teacher attacking anti-evolution statute). Plaintiff is the only movie theatre in Westmont. The Village Board of Trustees amended the zoning ordinance one week after the theatre began advertising 'adult movies coming soon.' Similarly, the Board of Trustees amended the licensing revocation ordinance during the pendency of this suit. Even though it has not specifically threatened plaintiff with prosecution, the Village's conduct indicates more than a broad policy that it will enforce the laws generally. *See Poe v. Ullman*, 367 U.S. 497, 501, 81 S.Ct. 1752, 1754, 6 L.Ed.2d 989 (1961). Plaintiff can reasonably assert that in fears enforcement of these two ordinances for specific conduct on its part. 'Under such circumstances, this Court does not feel it "necessary

that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute he claims deters the exercise of his constitutional rights."' *Natco Theatres v. Ratner*, 463 F.Supp. 1124, 1127 (S.D.N.Y. 1979), quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974). See *Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976)."

"Plaintiff also alleges that the vagueness of the ordinance makes it uncertain whether the adult movie zoing ordinance applies to it at all; if is does apply, plaintiff attacks the ordinance's lack of standards. 'In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not he applied for a license.' *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965). Similarly, no film of plaintiff has been declared obscenne. But plaintiff need not seek closure of its theatre in order to activate judicial review. Plaintiff alleges 'infringement of a constitutional right by the administrative process itself.' *Moore v. East Cleveland*, 431 U.S. 494, 528 n.3, 97 S.Ct. 1932, 1950, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). Such a 'broadside attack' presents a justiciable controversy. See *Times Film Corp. v. Chicago*, 365 U.S.43, 50, 81 S.Ct. 391, 395, 5 L.Ed. 403 (1963).

We conclude that plaintiff's case is ripe for resolution at this time."

In the recent case out of the Ninth Circuit, *Western Mining Counsel, et. al. v. Watt* (as Secretary of Interior) 643 F.2d 618 (April 23, 1981) the Court required only that:

1. Case or controversy requirement for Federal Court jurisdiction demand first that issues be justiciable and that plaintiffs having standing to assert their claims; and that
2. Standing requires as a constitutional minimum that plaintiffs alleged such personal stake in the outcome of controversy as to assure that concrete adversity which sharpens presentation of issues upon which court so largely depends for illumination of difficult constituional questions.

This Court in *U.S. Parole Commissions, et. al. v. Geragny*, _____ U.S. _____ S.Ct. 1202 held in essence that justiciability under Article III of the Federal Constitution case or controversey requirement is neither a legal concept with a fixed content not susceptible of scientific verification.

Further this Court in *Babbitt v. United Farmworkers Nat. Union*, _____ U.S. _____ 99 S.Ct. 2301 (1979) deal with the issue of case or controversy requirement and ruled that the difference between an "abstract question" and a "case or controversy" is one of degree and is not discernible by any precise test; and no basic inquiry is whether conflicting contentionns of the parties present a real, substantial controversy between parties' having adverse legal interests, a dispute, definite and conrete, not hypothetical or abstract. *U.S. Const. Art. 3. S.1 et seq.*

This Court in *Babbitt, supra,* went on to hold that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, but one need not await consummation of threatened injury to obtain prevented relief, for if injury is certainly impending that is enough, relying on U.S. Const. Art. 3., 5.1 et seq.

Predicated on the undisputed facts before the trial judge in the case at bar, those facts as considered by the Appellate Court in the case at Bar, and the appropriate jurisprudence part of which is referred to honoring this reason for granting plenary review as urged on the Court by Appellant Brockett is insubstantial and the judgment below should be summarily affirmed.

B

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED *VANCE v. UNIVERSAL AMUSEMENT CO., INC.*, 63 L.Ed.2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The argument is made by Brockett that no "prior restraint" is implicated in the Washington Statutory Scheme challenge herein and *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 63 L.Ed.2d 413,100 S.Ct. 1156 is not controlling.

Strong language from an Appellant, who on two (2) separate occasions filed Extraordinary Petitions for Certiorari with this Court pending appeal in the Ninth Circuit, and asking on both occasions to be joined as party in the *Vance* case because of the similarity of issues.

An adverse opinion in *Vance* and *ergo*, Appellant Brockett seeks to disassociate himself and his cause with the *Vance* case, but consistency of position has never been considered the matriarch of the adversary relationship.

The trial judge considering the concept of prior restriant in 1978 without the benefit of this Court's ruling in *Vance v. Universal Amusements Co., Inc.*, 445 U.S. 308 (1980) hold that the challenged statute would permit a prohibited "prior restraint" — 449 F. Supp. at pages 1152 through 1157, the contents of which are incorporated herein by reference.

The Ninth Circuit, with the benefit of this Court's ruling in *Vance* analyzed the same in term of the challenged Washington statute and ruled that an "invalid prior restraint" could be imposed under the statutory scheme in question. See 631 F.2d at 138, and thus held it unconstitutional.

C

WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION?

Appellant Brockett continues to insist in this Court as he did in the District Court, the Appellate Court and now again in this

Court that the dismissal for want of a substantial federal question by this Court in *Art Theatre Guild, Inc., et al. v. Ewing*, 421 U.S. 923, 44 L.Ed. 82, 95 S.Ct. 1649 (1975) and the rationale thereon was controlling on all inferior courts under the doctrine of *Hicks v. Miranda*, 422 U.S. 332; 45 L.Ed. 223, 95 S.Ct. 2281 (1975).

The District Court in the case dealt in its opinion with this issue as follows; 449 F.Supp. at 1150-1151 and concluded that, " . . . the constitutionality of initiating 335 is not foreclosed by prior authoritative decisions of the United States Supreme Court."

The Ninth Circuit felt no compelling need to discuss the *Art Theatre Guild, Inc., et al. v. Ewing*, 421 U.S. 923 concept in light of *Hicks v. Miranda*, 422 U.S. 332, because as the teaching of Hicks makes abundantly clear, the lower courts are bound by summary decisions of the Supreme Court until such time as the Court informs them they are not. Hence the decision of the Court in *Vance* made moot any claimed precedential value of the *Art Theatre Guild, Inc., et al.* case, *supra*.

Further, it is clear that the doctrine regarding precedential value to be accorded summary dispositions first set forth in *Hicks v. Miranda, supra*, has been somewhat eroded over the passage of time, or perhaps further refined in the crucible of controversy.

In *Turner Elkhorn Mining Co., et al. v. Usery, 428 U.S.* _____, 96 S.Ct. 2882 (1976). The Court added a gloss to the *Hicks* doctrine which held in essence that the Supreme Court's summary affirmance in a prior case did not foreclose the District Court's determination of unconstitutionality regarding issues which were not before the Supreme Court on prior appeal.

This Court went on to hold that although several questions presented had been raised and decided in prior cases which had been disposed of by summary affirmance, Supreme Court having heard questions raised, would proceed to face them more fully.

In 1977, in the case of *Mandell v. Bradley*, 432 U.S. 173, 99 S.Ct. 2238, the Court held in pertinent part on this issue as follows:

> "The three-judge court in this case viewed this Court's summary affirmance in Salera as controlling precedent for the proposition that early filing dates, such as that employed in Maryland, are unconstitutionally burdensome on the independent candidate's access to the ballot, and therefore decided in favor of the appellees. We noted probable jurisdiction, 429 U.S. 813, 97 S.Ct. 52, 50 L.Ed.2d 73 (1976).
>
> The District Court erred in beliving that our affirmance in Salera adopted the reasoning as well as the judgment of the three-judge court in that case and thus required the District Court to conclude that the early filing date is impermissibly burdensome. *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), held that lower courts are bound by summary actions on the merits by this Court, but we noted that "ascertaining the reach and content of summary actions may itself present issues of real substance". Id., at 345 n. 14, 95 S.Ct., at 2290. Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.

"When we summarily affirm, without opinion . . . we affirm the judgment *but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be red as a renunciation by this Court of doctrines previously announced in our opinions after full argument.*"; *Fusari v. Steinberg*, 419 U.S. 379, 391-392, 95 S.Ct. 533, 541, 42L.Ed.2d 521 (concurring opinion of THE CHIEF JUSTICE).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After Salera, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including Salera, should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Here, the District Court ruled that legally, 'Salera decides the issue before us, and the latest expression of the Supreme Court, we are bound to follow it.' J.S. 12a. The precedential significance of the summary action in Salera, however, is to be assessed in the light of all of the facts in that case; and it is immediately aparent that those facts are very different from the facts of this case. There, in addition to the early filing date, signatures had to be gathered within a 21-day period. This limited time enormously

increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate."[1]

---

[1] "Because of its preoccupation with Salera, the District Court failed to undertake an independent examination of the merits."

In a case out of the Fifth Circuit, interpreting the impact of *Hicks v. Miranda, supra.* summary dispositions, in *Graham v. Wright* 525 F.2d 909 (1976), the Court at footnote 9 observed:

> "FN9. While the Supreme Court has held that lower courts are bound by summary decisions of the Supreme Court until that Court informs them otherwise, *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), we believe that Hicks can be readily distinguished from the present case. In *Hicks*, the Supreme Court was dealing with the precedential value of a dismissal for want of a substantial federal question; in it sholding that such a dismissal carried the same impact as a dispositon on the merits, the Court was countering the argument that the precedential value of a dismissal was equivalent only to that of a denial of certiorari. The Court's holding certainly cannot be interpreted to mean that a summary affirmance by the Supreme Court of a lower court judgment is binding on questions not presented to that Court on appeal. See, *Swarb v. Lennox*, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972) (Supreme Court's affirmance of District Court judgment insofar as it refused to declare a state's statute unconstitutional does not constitute approval of other aspects and details not

before Supreme Court where no cross appeal taken by defendant)."

The Third Circuit in dealing with the *Hicks* rationale in *Super Tire Engineering Co., et al. v. McCorkle*, 550 F.2d 903 (1977) in part as follows:

> "*Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975) teaches that votes 'to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.' (quoting Ohio ex rel. *Eaton v. Price*, 360 U.S.246, 247, 79 S.Ct. 978, 3 L.Ed.2d 1200 (1959)). Of course, in such cases of summary adjudication, it is not always crystal clear what exactly was adjudicated by the Supreme Court."

See also, *Bickham v. Cashoff*, 620 F.2d 1238 (CA. 7 1980) criticizing the *Hicks* rationale.

For an lucid explanation of the *Hicks* rationale and its continual refinement and consequential limitations we read from the Third Circuit cases of *Lecates* et al. *Justice of the Peace Court No. 4 of the State of Delaware, et. al.* 637 F.2d 898 (1980) as follows:

> "It is necessary to determine at the outset of our analysis whether we are precluded from examing the merits of Lecates' contentions by virtue of the doctrine of *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). In *Hicks* the Supreme Court admonished that, absent supervening doctrinal developments, a summary affirmance or dismissal for want of a substantial federal question must be regarded as a disposition on the merits. The

rationale for treating them as such is that the Supreme Court's jurdisdiction over appeals from state courts is obligatory, and the Court therefore has no discretion to decline adjudicating the merits. Id. at 344, 95 S.Ct. at 2289. Justice White, writing for the Court, indicated, however, that lower courts would be bound only to the extent that the issues in the previous case were sufficiently the same to warrant treating it as a controlling precedent. He recognized further that ascertaining the content of summary dispositions would be no easy task.

From its inception, the rule of construction announced in *Hicks v. Miranda* appeared somewhat vulnerable, as criticism both from within the Court and from 'scholarly commentators' was forcefully expressed.[6] Justice Brennan argued that summary dispositions should not be accorded conclusive weight, because in practice such dispositions frequently received little more reasoned consideration than certiorari denials.[7] He, along with Chief Justice Burger, suggested that summary dispositions should be treated as affirmances only of the judgment, and not the reasoning of the lower court.[8] As the Supreme Court grappled with applying Hicks and ascertaining the implicit reach of summary dispositions, it began to qualify, by way of explaining, its strict edict that summary dispositions are completely conclusive of similar cases.[9] In *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977), the full Court finally embraced the position that had been advanced by Chief Justice Burger and Justice Brennan, and held that summary affirmances approve the result, but not necessarily the reasoning, of the decision under appeal. The Court instructed lower courts (1) to scrutinize the particular

facts and the jurisdictional statement of a case that was summarily disposed of to determine the "precise issues presented and necessarily decided" by the summary action, and (2) to give conclusive effect only to these narrow questions. Id. at 176, 97 S.Ct. at 240.[10]

"Doubts remained, however, whether issues "necessarily decided" included arguments that could be inferred from a petitioner's more explicit contentions. These doubts were resolved in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), in which the Court expanded *Mandel*, and made it clear that lower courts have leeway to consider the merits of cases within the confines of the Hicks doctrine. Specifically, Justice Marshall held that lower courts are foreclosed from re-examining only the exact queston formally made part of the jurisdictional statement in a case receiving summary treatment; no opinion on the merits of issues that "merely lurk in the record" may be inferred from a summary disposition. Id. at 182-83."

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[6] See, e.g., Comment, the Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some implications of *Hicks v. Miranda*, 76 Colum.L.Rev. 508 (1976), counseling lower courts to examine the precise questions presented to avoid giving summary affirmances a scope beyond that necessitated by the actual facts of the cases. This suggestion has now prevailed with the Supreme Court. See pp. 903-904 infra.

[7] *Siddle v. Majors*, 429 U.S. 945, 97 S.Ct. 366, 50 L.Ed.2d 316 (1976).
(Brennan and Marshall, JJ., dissenting from denial of certiorari); *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting).

[8] *Colorado Springs Amusement, supra; Fusari v. Stinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975).

[9] In several cases subsequent to Hicks the Court reverted to the looser standard of *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), which counsels that summary affirmances are not entitled to the same precedential weight or deference extended to rulings accompanied by full written expositions. Thus, in these cases the Court reexamined the merits of 441 U.S. 380, 390 n.9, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

The evolution away from the Hicks standard is detailed in Linzer, The Meaning of Certiorari Denials, 79 Colum.L.Rev. 1227, 1294-1299 (1979).

[10] Justice Brennan, concurring with the per curiam opinion Mandel, succinctly emphasized the import of the decision: it adopted his once dissenting view, it differed significantly from the unquestioning rule in Hicks, and it set forth guidelines for lower courts:

In a dissent from the denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976), I stated why, in my view, the federal and state courts should give "appropriate, but not necessarily conclusive, weight to our summary disposition," id., at 923, 96 S.Ct. at 3233, rather than be required, as the Court held in Hicks, "to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances." 428 U.S. at 913, 96 S.Ct. at 3229.

The Court by not relying on our summary affirmance in *Tucker v. Salera*, 424 U.S. 959, 96 S.Ct. 1451, 47 L.Ed.2d 727 (1976), and *Auerbach v. Mandel*, 409 U.S. 808, 93 S.Ct. 55, 34 L.Ed.2d 69 (1972), effectively embraces that view, and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the

same and, if they were, (b) determine that the judgment in fact upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.

432 U.S. at 179-180, 97 S.Ct. at 2242.

No Justice in any respect questioned Justice Brennan's explanation."

In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740 (1979), Mr. Justice Stewart, writing for the Court at Pages 477 and 478 at Footnote 20, summarizes again, the impact of the *Hicks v. Miranda* rule as follows:

"Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-345 (93 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223) in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (97 S.Ct. 2238, 2240, 53 L.Ed.2d 199). They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (94 S.Ct. 1347, 1359, 39 L.Ed.2d 662); *Richard v. Ramirez*, 418 U.S. 24, 53 (94 S.Ct. 2655, 72 Ohio Ops.2d 232. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, see, e.g., *Mandel v. Bradley, supra*, necessarily reflect our agreement with the opinion of the court whose

> judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. *Masachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 309 n 1, 49 L.Ed.2d 520, 96 S.Ct. 2562; *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 14, 49 L.Ed.2d 752, 96 S.Ct. 2882. We do so in this case. The question that Washington asks us to avoid or to resolve on the basis of stare decisis has never received full plenary attention here. It has been the subject of extensive briefing and argument by the parties. It has provoked several, somewhat uncertain, opinions from the Washington courts, see n 27, infra, whose ultimate judgments were the subjects of summary dismissals here."

We recount this history of the eventual evolution away from a strict application of the *Hicks v. Miranda* rule to demonstrate that lower courts are not absolutely precluded from considering the merits of contentions that are similar to issues raised in a summarily affirmed case. In short, under *Mandel* and *Illinois State Board*, the precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed in the jurisdictional statement. Furthermore, indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition.

This is not to suggest that summary disposition may be disregarded or should have little weight. On the contrary, in those situations where a summary judgment is applicable, it is a binding precedent. The recent Supreme Court explanations indicate, however, that we must ascertain carefully whether a summary affirmance or dismissal does indeed apply in a subsequent case and it is precisely this which the Ninth Circuit has

done subsequent to this Court's consideration of the *Vance* case, after full plenary attention; including extensive briefing and argument by the parties involved. The *stare decisis* value, if any, of the summary disposition in *Art Theatre Guild, Inc., supra,* is non-existent in view of *Vance vs. Universal Amusements Co. Inc., supra.*

It is clear that the District Judge engaged in the kind of inquiry suggested by *Hicks, supra,* and it's progeny and found the *Art Theatre Guild, Inc.,* case not controlling. It is equally clear, that when the U.S. Supreme Court had a chance to consider similar issues in *Vance,* and after briefing and argument, ruled as it did, then under the rationale of *Hicks* and *Mandall v. Bradley, supra. Art Theatre Guild, Inc., supra* has been overuled, if indeed it ever was the law.

Accordingly, here again the issue raised for plenary review by the Appellant Brockett is so insubstantial as to justify summary affirmance of the judgment.

In *Illinois State Board of Education vs. Socialist Workers,* 440 U.S. 173 at 180-181 (1979), Mr. Justice Marshall reviewed the authorities concerning the precedential value of summary dispositions and stated, "We note at the outset the summary affirmances have considerably less precedential value, that an opinion on the merits. See *Edelman v. Jordan,* 415 U.S. 651, 671 (1974) . . . "A summary disposition affirms only the judgment of the Court case cided and may no more be read into our action than was essential to sustain that judgment." "Mr. Justice Marshall, commenting on *Mandel, supra,* concluded that to be foreclosed from future consideration an issue must have been *precisely presented* to the Court and "*necessarily decided*" by the summary dispositon.

CONCLUSION

For the reasons indicated, the judgment of the United States Court of Appeals for the Ninth Circuit in 631 F.2d 136, should be summarily affirmed and costs awarded to Plaintiffs-Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the within Motion to Affirm have been sent by U.S. Mail, postage prepaid to Donald C. Brockett, Appellant, Spokane County Prosecutor, Spokane, Washington 99260. Dated June 15th, 1981.

/S/

Robert Eugene Smith
Attorney for Appellees

QUESTIONS PRESENTED

I

(Re Abstention Doctrine)

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

II

(Re Vance v. Universal Amusement Co., Inc.)

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED VANCE v. UNIVERSAL AMUSEMENT CO., INC., 63 L.Ed.2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

III

(Re Hicks v. Miranda Rule)

WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL "FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION"?

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No. 80-1604

In the
Supreme Court of the United States

OCTOBER TERM, 1980

SPOKANE ARCADES, INC., A Washington Corp.; PLAYTIME THEATRES, INC., A Washington Corp.; J-R DISTRIBUTORS, INC., A Washington Corp.; and SPORTLAND AMUSEMENT, INC., A Washington Corp.;

PLAINTIFFS-APPELLEES

v.

DONALD C. BROCKETT, Prosecuting Attorney in his representative capacity only;

DEFENDANT-APPELLANT

and

THE HONORABLE DIXIE LEE RAY, as Governor of the State of Washington in her representative capacity only; HONORABLE BRUCE K. CHAPMAN, Secretary of State of Washington, in his representative capacity only; HONORABLE SLADE GORTON, as Attorney General of the State of Washington, in his representative capacity only;

DEFENDANTS

On Appeal from the
Ninth Circuit Court of Appeals

Amicus Curiae Brief of the City of Santa Ana, California, in Support of the Appellant

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Interest of Amicus Curiae

During the past 4 1/2 years (Nov. 2, 1976 - April 1981), the City of Santa Ana

has expended more than $190,000 in civil public nuisance abatement litigation with a theater,[1] located in a large shopping center across the street from the Santa Ana Junior College. Such litigation was commenced without the benefit of a special public nuisance abatement statute such as the Washington Initiative Statute under consideration herein. Instead, it was undertaken pursuant to the authority of the Busch decision in California, which upheld the application of California's

[1] Thus far, the City of Santa Ana has filed four civil lawsuits against the theater (which openly admits that it exhibits only hard-core pornography) involving the exhibition of 144 pornographic motion picture films in a 4 1/2 year period. During the period of such lawsuits there have been no arrests, no seizure of films, and the theater has continued to operate. In retaliation, the defendants in the state action have sued the City Council and its attorneys, individually and in their official capacity, in two federal lawsuits, one a copyright action and the other a civil rights action. See "Interest of Amicus Curiae" at pgs. 2-9 of the Amicus Curiae Brief of the City of Santa Ana, California, in support of Petitioners in City of Newport et al. v. Fact Concerts, Inc. et al. No. 80-396, October Term 1980.

general public nuisance statute (enacted as part of the N.Y. Field Code in 1872) to the exhibition of obscene motion picture films.[2]

A judgment in favor of the City in the first of such public nuisance abatement lawsuits, which accorded partial relief, was recently upset upon appeal in an opinion which relied upon this Court's 5-4 per curiam opinion in Vance et al. v. Universal Amusement Co., Inc. et al., 455

[2] In People of the State of California ex rel. Busch v. Projection Room Theater et al., 17 Cal.3d 42, 53; 130 Cal.Rptr. 328, 334 (June 1, 1976), petition for certiorari denied in Van de Kamp, as District Attorney v. Projection Room Theater et al. No. 76-540, 428 U.S. 922, 50 L.Ed.2d 289, 97 S.Ct. 320 (Nov. 1, 1976), the California Supreme Court relied upon this Court's decision in Huffman v. Pursue Ltd., 420 U.S. 592, 605, 95 S.Ct. 1208, 1209, 43 L.Ed.2d 482, to hold that California Civil Code Sections 3479 and 3480 and Penal Code Sections 370 and 371 provided the authority for a civil public nuisance abatement lawsuit against the exhibition of obscene motion picture films. The first Santa Ana public nuisance abatement lawsuit entitled People ex rel. Gow, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, No. 25-65-30, was filed on Nov. 2, 1975, the day after this Court denied certiorari in the Projection Room Theater case.

U.S. 308, 315; 63 L.Ed.2d 413, 100 S.Ct. 1160-1161 (Oct. 15, 1979).[3] Amicus submits that the present uncertainty in public nuisance law, exemplified in the conflict between the rulings of the trial and appellate court in the Santa Ana case

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[3] See People ex rel. Gow, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater et al., 114 Cal.App.3d 923, 171 Cal.Rptr 85 at 91, 93 (Jan. 20, 1981), Petition for Hearing in the California Supreme Court filed on Mar. 2, 1981 and presently pending before that Court. In the trial court, the jury awarded a total of $76,400 in compensatory damages and the trial court permanently enjoined the exhibition or advertising by the defendants of the 11 films found to be obscene; ordered the defendants to allow the city's officers "free and total access to all parts of the theater" for a two year period for monitoring purposes; ordered the defendants to deposit $100,000 "in trust for the City... as a security deposit against future attorney fees, costs and expenses incurred by the City" in abating future nuisances by the defendants within a two-year period; ordered the destruction of the 11 "motion picture film prints" that were found obscene; and awarded the City the recovery of 5,869.31 in costs. After citing this Court's opinion in Vance, supra, the Court of Appeal reversed, holding at pg. 90: "...all the remedies, save the injunction are inappropriate."

See also Amicus Curiae Brief of the City of Santa Ana, California in support of Petition for Rehearing in Vance et al. v. Universal Amusement Co., Inc. et al., No. 78-1588, in the Supreme Court of the United States, October Term, 1979 at pg. 2, fn. 1 and text thereto.

is the result of this Court's not having squarely faced the obscenity nuisance abatement problem since its decisions during the 1974 October Term in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, (Mar. 18, 1975), and Art Theater Guild, Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975), appeal dismissed for want for a substantial federal question. Unless this Court settles the substantial federal questions which are raised in the jurisdictional statement herein, such uncertainty will continue, and the City's ability to effectively resolve its pending public nuisance abatement litigation in the state court will be impaired.

In addition, the special counsel for the City in such public nuisance abatement litigation, James J. Clancy, is also a co-author of Washington State Initiative Measure 335, which is the subject of the

appeal herein. Mr. Clancy recently appeared as an amicus curiae in Chateau X, Inc. v. State of North Carolina ex rel. William H. Andrews, infra, involving the North Carolina Public Nuisance Statute,[4] which is substantially the same as Washington State Initiative Measure 335. In that case, the North Carolina Supreme Court on Mar. 4, 1981 upheld the constitutionality of the North Carolina Public Nuisance Statute as applied, for the second time, and readopted its prior decision of Jan. 4, 1979 to that effect. See State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (Jan. 4, 1979), remanded for reconsideration in light of Vance et al. v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (Mar. 18, 1980) and readopted and reaffirmed in Chateau X,

[4] Chapter 19, Art. 1, North Carolina General Statutes "Abatement of Nuisances", as added by Session Laws 1977, Ch. 819, effective Aug. 1, 1977.

Inc. et al. v. State of North Carolina ex rel. Andrews, 302 N.C. ___, ___ S.E.2d ___ (Mar. 4, 1981). Copies of the North Carolina Supreme Court Chateau X, Inc. opinions, filed in the North Carolina case on Jan. 4, 1979 and Mar. 4, 1981, are set forth at Appendices C and D herein.

Both Washington State Initiative Measure 335 and the North Carolina Statute were modeled after the 1976 Idaho Moral Public Nuisance Statute, Idaho Code §52-101 through §52-417, effective July 1, 1976, which Mr. Clancy also co-authored.[5]

[5] That Initiative Measure 335 and the 1977 North Carolina Statute are modeled after the 1976 Idaho public nuisance abatement statutes can be established by evidence aliunde; namely, by comparing the two statutes, section by section. See Appendices A and B to this amicus curiae brief. The event leading up to the drafting of Initiative Measure 335 are as follows: Mr. Clancy was counsel of record in two public nuisance abatement cases which were decided by this Court during the 1974 Term of Court: Huffman v. Pursue Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (Mar. 18, 1975) and Art Theater Guild Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975). After the decision of this Court upholding the Ohio public nuisance abatement statute as applied to the film "Without a Stitch" (This footnote is continued on the next page)

The 1976 Idaho Moral Public Nuisance Statute was also successfully applied by the Idaho Attorney General and the Ada County (Boise) Prosecutor in test litigation in Idaho ex rel. Kidwell et al. v. U.S. Marketing Inc., et al., Civil No. 60874 and Idaho ex rel. Kidwell et al. v.

in the Art Theater Guild Inc. case, see Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2231 (June 24, 1975), Mr. Clancy was requested by the Idaho Attorney General's office to prepare an amendment to the Idaho Code which would encorporate the Art Theater Guild Inc., Ohio public nuisance abatement sections, as applied, into Idaho Law. Thereafter, the amendment, as submitted, was adopted into Idaho Law in sustantially the same form as it was originally submitted (Title 52, Chapters 1 and 4 of the Idaho Code, as added by S.L. 1976). Thereafter, Mr. Charles R. Lonergan, Jr., a member of the Washington State Bar, requested Mr. Clancy to prepare legislation for the State of Washington, modeled after the Idaho Moral Public Nuisance Statute. The draft which Mr. Clancy co-authored became the text of Initiative Measure 329 (which failed to qualify for the Nov. 1976 ballot) and Initiative Measure 335, which qualified and was approved by the People of the State of Washington on Nov. 8, 1977 and is now codefied as RCW 7.48.050 through 7.48.100. In November of 1976, Mr. Clancy made a copy of the Idaho Law available to a North Carolina resident and, thereafter, the North Carolina Legislature enacted a statute embodying those concepts during the 1977 session of the Legislature.

Niks Adult Bookstore et al., Civil No. 60875 in which Mr. Clancy rendered services as consulting attorney to the Idaho Attorney General's office. Copies of the Idaho District Court's Memorandum Decision and Order filed July 15, 1977, Memorandum Opinion and Findings of Fact and Conclusions of Law, filed Jan. 16, 1978, and Memorandum Decision and Order filed July 28, 1978 are set forth herein at Appendices E, F and G. Both cases are presently upon appeal and cross-appeal to the Idaho Supreme Court and were argued to that Court on or about Feb. 11, 1981. In their "Statement of the Facts" at page 3 of their "Brief of Respondents" the defendants/respondents have stated they are not attacking the Idaho statute on its merits:

> "...The state appealed both Judge Hagan's decision declaring unconstitutional the provisions of the Complaint asking for closure of the premises and Judge Smith's decision

> with respect to attorney's fees. The defendants are appealing only the granting of attorney fees to plaintiff and are not appealing any issue on the merits".

The decision of the North Carolina Supreme Court upholding the constitutionality of the North Carolina Public Nuisance Abatement Statute as applied in Chateau X, Inc., supra, and the decision of the Idaho District Court upholding the constitutionality of the Idaho Public Nuisance Abatement Statute as applied in U.S. Marketing, Inc., supra, and Niks Adult Bookstore, supra, both of which statutes are virtually identical to Washington State Initiative 335,[6] establish a real conflict with the 9th Circuit Court of Appeals decision herein which holds that the Washington Initiative Statute is unconstitutional on its face and is not susceptible of a constitutional construction. Amicus Curiae submits that

[6] See Appendices A and B and the text to footnote 5 supra.

such conflict warrants a review of the questions raised in the Jurisdictional Statement at this time. See Supreme Court Practice, 5th Edition, Stern and Gressman, §4.9 at page 280. Memorial Hospital v. Maricopa County 415 U.S. 250, 253, 39 L.Ed.2d 306, 312, 94 S.Ct. 1076 (Feb. 26, 1974); Ward v. Illinois, 431 U.S. 767, 770-771, 52 L.Ed.2d 738, 744, 97 S.Ct. 2085 (June 9, 1977).

SUMMARY OF ARGUMENT

The Federal Court should have acquiesced in the prosecutor's request that the federal system defer to the state court on the initial construction to be given the public nuisance initiative, adopted by a vote of the people.

The federal courts lack jurisdiction to construe state legislation authoritatively. They must defer if any state court construction can save the statute.

A state court is under a duty to its

sovereign to construe state statutes in a constitutional manner. A federal court does not have that same obligation.

Federal interference was not authorized under the Younger v. Harris, and Huffman v. Pursue, Ltd. exception. Both the North Carolina Supreme Court and the Idaho District Court have so held, in construing what is essentially the same statute.

Vance v. Universal Amusement Co., Inc. is not apposite. The North Carolina Supreme Court's opinion in Chateau X, Inc. so holds.

The ballot use of the initiative process to enact a state public nuisance abatement statute is an exercise in state sovereignty. The federal lawsuit interfered with the public administration of the initiative process and is barred by the 11th Amendment.

The people have a sovereign right to

have the initiative legislation construed favorably by the State judiciary. Although a state may waive the 11th Amendment privilege, it has not done so in this case.

Basic principles of federalism and comity expressed in Huffman v. Pursue, Ltd. and the successor cases: Judice v. Vail, Trainor v. Hernandez, Ohio Bureau of Employment Services v. Hodory, Moore v. Sims, and Allen v. McCurry require that, in public nuisance litigation, the federal forum must defer if the state forum is available and the state does not waive its 11th Amendment privilege.

Because the Federal Courts cannot demonstrate that the Washington courts will not construe the temporary injunction procedures in a constitutional manner, as in S.S.W. v. Slaton, it was error to hold such procedures (RCW §7.48.066) as unconstitutional on their face.

ARGUMENT

I

THE FEDERAL COURT ERRED IN FAILING TO ACQUIESCE IN THE STATE PROSECUTOR'S REQUEST THAT THE FEDERAL SYSTEM DEFER TO THE STATE COURT ON THE ISSUE OF THE CONSTITUTIONALITY OF THE COMPREHENSIVE PUBLIC NUISANCE ABATEMENT INITIATIVE STATUTE WHICH HAD BEEN ADOPTED BY A VOTE OF THE PEOPLE.

(A) The Rule Which Requires A Federal Court To Defer So That The State Court May Render The First Construction Of The Statute, Is A Derivative Of State Sovereignty. This Court Has Stated That In Such Matters, The Federal Courts "Lack Jurisdiction."

In U.S. v. 37 Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), this Court noted that the federal courts "lack jurisdiction" authoritatively to construe legislation. The federal court in Stecher v. Askew, 432 F.Supp. 997 (June 7, 1977) gave expression to a principle of law which seems particularly apposite, at page 949:

> "...'we lack jurisdiction authoritatively to construe state legislation.' U.S. v. 37 Photographs, 402

> U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). ...The narrow inquiry before us therefore is whether a state law... is consistent with constitutional standards, or can be rendered consistent with them by further state court interpretation.
>
> "...For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida court's further defining the words 'necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla. 1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (our emphasis).

One fundamental reason for the rule which requires a federal court to defer to the state court is the personal duty which the state court owes to the sovereign state it represents. It is a generally accepted principal of law that the State Courts are obliged to construe state statutes so as to arrive at a

constitutional result. In People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976), the California Supreme Court noted that the state court may even have to "imply" provisions which do not exist, see pg. 335:

> "...Similarly, as we explain hereinafter, the California public nuisance statute must be enforced in such a way as to operate in a constitutional fashion. So applied, as the foregoing cases make clear, there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes."

and, at page 336:

> "...Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts... (Our emphasis.)

and, at page 338:

> "...We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have

> held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions." (Our emphasis.)

Compare, in this regard, the antithetical viewpoint of the Federal Court of Appeals' below (See opinion in Jurisdictional Statement at page 47a):

> "...That the statute contains a severability clause, Wash. Rev. Code §7.48.900 does not authorize us to indulge in major revisions to salvage the statute. Id. at 833-34. We are certain that the legislature of the State of Washington can do this better than we."

Notwithstanding this rule as to jurisdiction derived from state sovereignty, the federal court below did not defer to the state judiciary for an "authoritative interpretation," but elected instead, to give the new legislation its first interpretation.

(B) Recent Decisions In North Carolina And Idaho, Which Have Construed The Public Nuisance Abatement Statutes Of Those States, Demonstrate That The Washington Initiative Statute Is Not Facially Unconstitutional So As To Authorize Federal Interference.

The Court of Appeals erred in its ruling that federal interference was authorized under the abstention exception noted in Younger v. Harris, 401 U.S. 53-54, 27 L.Ed.2d 669, 91 S.Ct. 746, and Huffman v. Pursue Ltd., supra, which permits a federal court to act where a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[7] Both the North Carolina Supreme Court and the Idaho District Court have held otherwise in construing what is essentially the same statute.[8]

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[7] See opinion in Jurisdictional Statement at pg. 42a:

"...the dispositive issue is whether the procedures are capable of a construction that could avoid the constitutional issues. We do not think that the procedures are capable of such a construction."

[8] See "Interest of Amicus Curiae", supra, at pages 6 - 10 and Appendices A and B to this brief. The supporting rationale of the North Carolina Supreme Court is set forth in its opinion

The Court of Appeals' citation of Vance et al. v. Universal Amusement Co., Inc., 455 U.S. 308, 63 L.Ed.2d 413, 100 S.Ct. 1156, in support of its refusal to abstain (see opinion at pg. 43a of the Jurisdictional Statement) is inapposite. Abstention was not an issue in Vance.[9]

Further, Vance does not support the U.S. District Court's ruling that the procedures were not capable of a constitutional construction. The North

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of Jan. 4, 1979 at Appendix C. The supporting rationale of the Idaho District Court is set forth in its opinions of July 15, 1977 and Jan. 16, 1978 at Appendices E and F.

[9] See Jurisdictional Statement in Vance, filed Apr. 17, 1979 and "Brief for the Appellant" in Vance, filed Aug. 17, 1979. The Attorney General of Texas had conceded the jurisdictional point; i.e., that the case was properly before the federal court system. Although Assistant Attorney General Lonny F. Zwiener mentioned Moore v. Sims, 442 U.S. 415, 60 L.Ed.2d 994, 99 S.Ct. 2371 (June 11, 1979) and the Pullman doctrine during his oral argument on Nov. 28, 1979, he abandoned that claim when Justice Stewart pressed him on the concessions of the State of Texas in the federal court below and in the "Brief for the Appellant" on file with this Court. (See transcript for Nov. 28, 1979 at pgs. 5-6.)

Carolina Supreme Court's second opinion handed down on March 4, 1981, after remand of its first opinion by this Court for consideration in light of Vance et al. v. Universal Amusement Co., Inc., supra, is squarely in point and holds to the contrary. See the March 4, 1981 opinion of the North Carolina Supreme Court at Appendix D-23 herein, which holds, regarding the North Carolina Public Nuisance Abatement Statute:

> "...our laws do not share the constitutional infirmities of Texas law, and the principles enunciated in Vance do not control the disposition of the case sub judice. We find nothing in Vance which requires us to depart in any way from our prior decision.

(C) The Ballot Use Of The Initiative Process To Enact A Public Nuisance Abatement Initiative Statute Is An Exercise In State Sovereignty Which Is Subject To The Eleventh Amendment. Judicial Challenges Are A Part Of That Process And Belong In The State Judicial System.

The Court of Appeals' ruling that

(See opinion in Jurisdictional Statement

at pg. 42a):

> "...appellee is not required to exhaust all state remedies prior to bringing this action in federal court."

is error. The federal court failed to give proper consideration to the fact that the ballot use of the initiative process to enact a state public nuisance abatement statute and judicial challenges thereto are an exercise in state sovereignty. See Love v. King County et al., 181 Wash. 462, 44 P.2d 175 at pg. 178, where the Washington Supreme Court noted:

> "...In this case we have instead of statute, an initiative measure limiting the taxing power. That, however, can make no difference, for the latter is as much a legislative act as is the former. By Article 2, § 1, Amendment 7 to the state Constitution, it is provided that the legislative authority of the state shall be vested in the Legislature, with an express reservation in the people of the power to propose bills and laws and to enact or reject the same at the polls. The first power so reserved is the initiative. The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a

> statute. State v. Paul, 87 Wash. 83, 151 P. 114; State ex rel. Miller v. Hinkle, 156 Wash. 289, 286 P. 839." (Our emphasis.)

Under the 11th Amendment, a state may not be sued in a federal court by one of its own citizens under the claim that the case is one arising under the Constitution or laws of the United States, Hans v. Louisiana, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504. A suit may be barred by the 11th Amendment even though the state is not named as a party to the action, Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347.

Analytically, the federal lawsuit against the Spokane County Prosecutor, under the trial facts herein, was a suit against the Sovereign and was barred by the 11th Amendment, in that the lawsuit interfered with the public administration of the initiative process. A suit is considered to be one against the sovereign when:

> "...the essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration", Land v. Dollar, 330 U.S. 731, 91 L.Ed 1209, 67 S.Ct. 1009, (our emphasis).

Although a state may waive the privilege of the 11th Amendment and consent to be sued in the federal courts, Curran v. Arkansas, 15 How. 304, 14 L.Ed. 705, such was not done in this case. The Prosecuting Attorney of Spokane County has objected to the federal jurisdiction in the U.S. District Court, in the Court of Appeals, and in his Jurisdictional Statement on file in this Court.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 481, 97 S.Ct. 1898, 1904, 52 L.Ed. 513 (1976), cited by the Court of Appeals in support of its holding that abstention was inappropriate is distinguishable. First, in Hodory, the abstention issue was raised by the amicus curiae AFL-CIO, not the state. The Court

specifically noted at pg. 521 that a federal court was not compelled to abstain where the state voluntarily chose to submit to the federal forum as the State of Ohio had done in the U.S. Supreme Court in Hodory. See Hodory at pg. 522, fn. 10. In Spokane Arcades Inc., however, the Prosecuting Attorney of Spokane County has repeated his objection to the federal jurisdiction in his Jurisdictional Statement on file in this Court.

Further, in Hodory, the 3 judge U.S. District Court noted at the text to footnote 9 on pg. 521 that:

> "...the issue as to the constitutionality of the labor dispute disqualification has apparently been settled."

in the state court. That situation did not exist in the trial court below. Even before the initiative measure had been certified by the Secretary of State, and against the express wish of the State, U.S. District Judge Fitzgerald interposed

himself[10] between the sovereign right of the People of the State of Washington in their attempt to use the ballot to enact into law an effective public nuisance abatement initiative statute and their concomitant sovereign right to have that initiative legislation construed by the judiciary in the state forum where it would have the advantage of the Washington State rule on the favorable construction to be accorded initiative measures, expressed in Culleton et al. v. Chase et al., 174 Wash. 363, 25 P.2d 81 at 84:

> "...that every intendment should be brought to bear in favor of the validity of a statute or enactment and if any reasonable doubt appears

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[10] In his conclusion, U.S. District Judge Fitzgerald stated in Spokane Arcades Inc. v. Ray et al., 449 F.Supp. 1145 at 1158:

> "...There is every reason to believe that the State of Washington, county or city prosecutors, or private citizens will imminently prosecute one or more of the plaintiffs on the basis of Initiative 335... as I believe that the responsible state officers involved in this action will not prosecute under an unconstitutional statute, I find no present necessity for the issuance of an injunction..."

it should be resolved in favor of the validity of the law..."

(D) The Basic Principles Of Federalism and Comity Expressed In Huffman v. Pursue Ltd., And Subsequent Cases Require That Where The Interest Involves State Sovereignty, As In The Case Of Nuisance Abatement Of Moral Public Nuisances, The Federal Claim Must Be Presented To The State Forum In The First Instance If That Forum Is Available And The State's 11th Amendment Privilege Has Not Been Waived.

When this same issue (the need for abstention in public nuisance abatement litigation) was before this Court six years ago in Huffman v. Pursue Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (Mar. 18, 1975) the Allen County, Ohio Prosecutor argued that the U.S. District Court lacked jurisdiction[11] and was required to dismiss the Civil Rights

[11] Appellant's focus in Huffman, and the principle argument for limiting federal interference was lack of jurisdiction in the federal court because of the "in rem" nature of the public nuisance abatement action (see Brief for Appellants at pgs. 34-40 and 58-68), rather than Amicus' argument herein: lack of jurisdiction because of the plaintiff's inability to surmount the jurisdictional principle expressed in the 11th Amendment.

Action. This Court's order in Huffman, supra, on the jurisdictional issue was equivocal, at pg. 612:

> "...We therefore think that this case is appropriate for remand so that the District Court may consider whether... the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind." (Our emphasis.)

Upon remand, and over the prosecutor's objection, U.S. District Judge Walinski dismissed the case on the ground of mootness, and the basic question of jurisdiction was never resolved.

During the 1976 October Term, Huffman v. Pursue Ltd., supra, was further applied by this Court in Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977) and Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 496, 97 S.Ct. 1911 (May 31, 1977) and distinguished in Ohio Bureau of Employment Services v. Hodory, supra. In his dissent in Judice,

Justice Stewart noted a significant difference between Pullman abstention and Younger-Huffman abstention, at pg. 348:

> "...Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (Our emphasis.)

See also Trainor v. Hernandez, 431 U.S. 434, 445, 52 L.Ed.2d 486, 496, 97 S.Ct. 1911 (May 31, 1977)[12] and Moore v. Sims,

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[12] In Trainor v. Hernandez, supra, this Court held that where Huffman v. Pursue Ltd. applies, the Court should dismiss the case:

> "...For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal

442 U.S. 415, 430, 60 L.Ed.2d 994. 1007, 99 S.Ct. 2371 (June 11, 1979), citing the Trainer v. Hernandez text noted above, in holding that the principles of Younger-Huffman acted as a bar.

While the language of this Court in Huffman v. Pursue, Ltd., supra, Judice v. Vail, supra, Trainer v. Hernandez, supra, and Moore v. Sims, supra, does not

courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extradordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (Our emphasis.)

specifically hold that federal "jurisdiction" is in question, that appears to be the necessary result. If not, what would be the reason for distinguishing between Pullman abstention and Younger-Huffman abstention?

That a federal court lacks jurisdiction in such matters where the trial facts show that the constitutional claim can be raised and fully litigated in a civil action in the state court finds support in the rationale expressed in Allen v. McCurry, ___ U.S. ___, 66 L.Ed.2d 308, 101 S.Ct. ___ (Dec. 9, 1980).

In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent and rationale which authorized federal jurisdiction in Civil Rights cases, (42 U.S.C. section 1983). In that decision, the majority made it clear that, except where the claim was made that a state

statute was unconstitutional on its face, it was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and were available (as here) to allow full litigation of the constitutional claim, See Allen et al. v. McCurry, supra, at page 317:

> "...To the extend that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (Our emphasis.)

In other words, it can no longer be claimed that every person asserting a

federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, at page 319:

> "...The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself." (Our emphasis.)

It would seem, therefore, that the constitutional rule must evolve that, as to the federal claim herein against the comprehensive public nuisance abatement initiative statute,[13] which does not

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[13] See Moore v. Sims, 442 U.S. 415, 427, 60 L.Ed.2d 994, 1005, 99 S.Ct. 2371:

> "...the breadth of a challenge to a complex state statutory scheme has traditionally militated in favor of abstention, not against it."

qualify under the exception of Huffman, supra, and which interferes with the sovereign right of a state to litigate moral public nuisances in its own judicial system, the party must first assert the federal claim in a state action and it is irrelevant in this case that the respondents herein jumped the gun and filed a federal lawsuit before the state prosecutor had an opportunity to move in the state court. See, in this regard, footnote 10, supra. Accordingly, a federal court would not have jurisdiction to hear a federal declaratory judgment action unless and until the state has waived its privilege under the 11th Amendment. Hans v. Louisiana, supra; Ohio Bureau of Employment v. Hodory, supra; Moore v. Sims, supra, at 429, 60 L.Ed.2d at 1007; Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764.

II

THE FEDERAL COURT ERRED IN ITS RULING THAT RCW §7.48.066, (WHICH AUTHORIZES A TEMPORARY INJUNCTION AFTER AN ADVERSARY HEARING AND A FINDING OF A MORAL PUBLIC NUISANCE), DID NOT MEET THE CONSTITUTIONAL STANDARD SET FORTH IN VANCE v. UNIVERSAL AMUSEMENT CO., INC.

The Court of Appeals' citation of Vance et al. v. Universal Amusement Co., Inc., supra, in support of its holding that RCW §7.48.066 is unconstitutional on its face, is inapposite. As the Jurisdictional Statement points out at pgs. 8-9, Vance was limited to a situation which was ex parte. In Vance, this Court held that a statutory procedure that called upon an ancillary process allowing a temporary injunction of indefinite duration upon an ex parte application showing probable success on the merits without a hearing was a "prior restraint". That rule of law can have no application to RCW §7.48.066, which relates to the orders which a court may issue after an

adversary hearing in which there has been a finding of a moral public nuisance.

As was stated in Stecher v. Askew, supra, there is absolutely no obstacle to the Washington court's further defining the terms of RCW §7.48.066. Further, neither the plaintiff nor the Federal Court can demonstrate that the Washington courts will not so act (see Point I(A), supra, at pg. 15).

Amicus contends that one construction that the Washington courts might adopt regarding the procedures to be followed for the entry and review of a temporary injunction under RCW §7.48.066, which would clearly meet the constitutional standards on the issue of "prior restraint", is that which was adopted by the Florida Supreme Court in S.S.W. Corp. v. Slaton, 204 S.E.2d 155 at 158. In S.S.W. Corp. v. Slaton, supra, the Fulton County Superior Court, after an adversary

judicial hearing, made a preliminary judicial determination that the film "Deep Throat" was obscene - pornographic as defined by Georgia law, and entered a temporary injunction prohibiting its showing in Fulton County.[14] A motion for

[14] See S.S.W. Corp. v. Slaton, supra, at 158:

"In this case the temporary injunction was not entered on the basis of mere 'probable cause' that the film was obscene. An adversary judicial hearing was conducted by a trial judge, he viewed the film itself, and he determined that the film was obscene within the meaning of Georgia law. He then entered a temporary injunction prohibiting the further showing of the film until further order of the court. A trial judge is authorized to perform this function under the law of Georgia, and we hold that what occurred in this case amounted to an interlocutory judicial determination that the film was obscene. An interlocutory judicial determination that material is obscene is not the equivalent of 'probable cause' that material may be obscene.

"We acknowledge that interlocutory judicial restraint with respect to a First Amendment claim must be reasonable and should be followed as promptly as is practicable by a final judicial determination of First Amendment issues. We tried to say this as plainly as we knew now in this court's order of October 1, 1973, denying the motion for supersedeas in this case (see appendix).

"But for this court to hold that a film, judicially determined to be obscene at a preliminary hearing, cannot be suppressed during the pendency of the litigation as to

an order to supersede that temporary injunction, to permit the continued showing of the film pending a final judgment in the case, was thereafter denied by the Georgia Supreme Court, following which the defendants took an appeal to the Georgia Supreme Court from the judgment granting the temporary injunction. In affirming the temporary injunction Associate Justice Gunter,

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whether it is obscene or not would effectively deny the state the right to suppress the showing of an obscene film. This is so because without the possibility of interlocutory prohibition, a film, ultimately adjudged to be obscene, could be shown during the many months and years of trial and appellate litigation permitted by our system before a judgment is absolutely final.

"Obscenity is not protected by the First Amentment, and after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment. In short, we hold that interlocutory judicial restraint of obscene material, with adequate provision being made that First Amendment claims can proceed to final judgment at the earliest practicable date, is not violative of First Amendment rights." (Our emphasis.)

held that the Fulton County Superior Court's order "amounted to an interlocutory judicial determination that the film was obscene", and "after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment".

Under the Georgia rule, the question is not "probable cause" for believing the subject matter to be obscene, or "probability of success" at the final hearing, but rather whether the subject matter shall be regarded as obscene in the "interlocutory judgment" sense,[15] until

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[15] See Calif. Procedure, Witkin (2nd Ed.), Vol. 5 at pg. 3186 et seq; 6 Cal. Practice at §51.9:

> §51.9. Interlocutory judgment.
>
> An interlocutory judgment is one that does not finally determine the issues between the parties, but rather leaves something further to be done in the nature of judicial action on the part of the court. Such a decree is distinguished from a final decree in that it is not a final and conclusive determination of the rights of the parties, but may be changed or modified as the law and evidence require, except in partition and divorce cases.

altered by: (1) appeal from the granting of the temporary injunction; (2) supersedeas writ for an unnecessary delay on the People's part in bringing the case to a final trial on the merits, see People ex rel. Gow v. Mitchell Bros., 101 Cal.App.3d 269, 304, 161 Cal.Rptr. 563, 567, at text to footnote 7; or (3) the presentation of additional evidence at the trial on the merits. Because the Federal Court cannot demonstrate that the Washington courts will not give RCW §7.48.066 the above constitutional construction, it was error to hold that such provisions were unconstitutional on their face.[16]

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[16] The 9th Circuit's holding (see opinion in Jurisdictional Statement at 44a) that the standard of the burden of proof must be set forth in the statute is error, for, "it is the kind of question which has traditionally been left to the judiciary to resolve." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 284, 17 L.Ed.2d 362, 368, 87 S.Ct. 483 (Dec. 12, 1966). Similarly, the suggestion (id. at 45a) that the priority provision of RCW §7.48.070 is inadequate, because the statute fails to address itself to the time interval between the issuance of the

(This footnote is continued on the next page)

CONCLUSION

This Court should grant plenary review of the three substantial federal questions which are presented in the Jurisdictional Statement on file herein.

Dated: April 17, 1981

Respectfully Submitted,

James J. Clancy
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temporary injunction and the final hearing, flies in the face of this Court's holding in U.S. v. 37 Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 830, 91 S.Ct. 1400 (May 3, 1971). The 9th Circuit's statement (id. at 45a) that the statute "impermissibly shifts the burden of showing a lack of obscenity to the person operating the alleged nuisance" is contrary to the Mar. 4, 1981 opinion of the North Carolina Supreme Court on that issue in Chateau X, Inc., which holds that, under an identical statute, the burden of proving obscenity is on the state (see Appendix D herein). The statement (id. at 45a) that "a defense of nonobscenity presumably is unavailable at a trial for violation of an injunction" is also disputed by the decision of the North Carolina Supreme Court in the Chateau X, Inc. case which holds that, under the statute, "nonobscenity is always a defense to a contempt proceedings" (see Appendix D herein).

CERTIFICATE OF SERVICE

I, hereby certify that on this 6th day of May 1981, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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Appendix A

(Reference: Amicus Curiae Brief At pg. 7, fn. 5
pg. 10, fn. 6
pg. 18, fn. 8)

A section by section comparison of the Idaho Moral Nuisance Statute with Washington Initiative Measure No. 335

..... A-1 thru A-107

APPENDIX A

A SECTION BY SECTION COMPARISON OF

THE IDAHO MORAL NUISANCE STATUTE (IDAHO CODE § 52-101 THRU 52-417 EFFECTIVE JULY 1, 1976)

WITH

RCW CHAPTER 7.48 AS AFFECTED BY WASHINGTON INITIATIVE MEASURE NO. 335 (EFFECTIVE NOVEMBER 8, 1977)

TEXT SYMBOLS:

>< WORDS AND/OR PHRASES ADDED IN OTHER STATUTE

<___> WORDS AND/OR PHRASES OMITTED IN OTHER STATUTE

____ WORDS AND/OR PHRASES DIFFERENT IN OTHER STATUTE

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

CHAPTER 1 - NUISANCES IN GENERAL

SECTION.

52-101. Nuisance defined.

52-102. Public Nuisance.

52-103. Moral Nuisances - Definitions.

52-104. Moral nuisances - Types.

52-105. Moral nuisances - Personal property - Knowledge of nuisance.

52-106. Moral nuisances - Building where gambling is carried on.

52-107. Private nuisance.

52-108. When not a nuisance.

52-109. Liability of successive owners for continuing nuisance.

52-110. Abatement does not preclude action.

52-111. Actions for nuisance.

CHAPTER 4 - MORAL NUISANCES - ACTION FOR INJUNCTION AND ABATEMENT

SECTION.

52-401. Cumulative remedy.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

CHAPTER 7.48

NUISANCES

Sections

7.48.010 Actionable nuisances defined.

7.48.020 Who May sue - Judgment for damages - Warrant for abatement - Injunction.

7.48.030 Issuance and execution of warrant.

7.48.040 Stay of issuance of warrant.

7.48.050 Houses of lewdness, assignation or prostitution may be abated.

7.48.060 ----- Nuisance may be enjoined.

7.48.070 ----- Evidence of general reputation admissible.

7.48.080 ----- Contempt for violation of injunction.

7.48.090 ----- Order of abatement.

7.48.100 ----- Disposition of proceeds of sale.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-402. Who may maintain action.

52-403. Pleadings - Jurisdiction - Venue - Application for temporary injunction.

52-404. Order restraining removal of personal property from premises - Service - Punishment.

52-405. Notice of hearing on temporary injunction - Consolidation.

52-406. Right to possession of real property and personal property after hearing on the temporary injunction - Conditions for avoidance of temproary forfeiture.

52-407. Right to possession of real property and personal property after finding of public nuisance - Conditions for re-entry and repossession.

52-408. Priority of action.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.110 ----- Voluntary abatement.

7.48.120 Nuisance defined.

7.48.130 Public nuisance defined.

7.48.140 Public nuisances enumerated.

7.48.150 Private nuisance defined.

7.48.160 Authorized act not a nuisance.

7.48.170 Successive owners liable.

7.48.180 Abatement does not preclude action for damages.

7.48.190 Nuisance does not become legal by prescription.

7.48.200 Remedies.

7.48.210 Civil action, who may maintain.

7.48.220 Abatement, by whom.

7.48.230 Public nuisance - Abatement.

7.48.240 Certain places of resort declared nuisances.

7.48.250 Penalty - Abatement.

7.48.260 Warrant of abatement.

7.48.270 Stay of Warrant.

7.48.280 Costs of abatement.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-409. Evidence.

52-410. Evidence of reputation admissible.

52-411. Costs.

52-412. Content of final judgment and order.

52-413. Court shall punish offender for violation of injunction or order.

52-414. Lease void if building used for lewd purposes.

52-415. Civil penalty - Forfeiture - Accounting - Lien as to expenses of abatement.

52-416. Immunity.

52-417. Severability.

>$<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.010 ACTIONABLE NUISANCES DEFINED*

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or

* NOTE: §7.48.010 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>§<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

7.48.020 WHO MAY SUE - JUDGMENT FOR DAMAGES - WARRANT FOR ABATEMENT - INJUNCTION*

Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate

* NOTE: §7.48.020 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>$<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined.

7.48.030 ISSUANCE AND EXECUTION OF WARRANT*

If the order be made, the clerk shall thereafter, at any time within six months, when requested by the plaintiff, issue such warrant directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant, and return the warrant as soon thereafter as may be, with his proceedings indorsed thereon. The expenses of abating the nuisance may be levied by the sheriff on

* NOTE: §7.48.030 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>§<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

the property of the defendant, and in this respect the warrant is to be deemed an execution against property.

7.48.040 STAY OF ISSUANCE OF WARRANT*

At any time before the order is made or the warrant issues, the defendant may, on motion to the court or judge thereof, have an order to stay the issue of such warrant for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving bond to the plaintiff in a sufficient amount with one or more sureties, to the satisfaction of the court or judge thereof, that he will abate it within the time and in the manner specified in such order. The sureties shall justify as provided by law. If the defendant fails to abate such nuisance

* NOTE: §7.48.040 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-103. MORAL NUISANCES - DEFINITIONS.-- As used in Title 52, Idaho Code, relating to moral nuisances.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(B) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

within the time specified, the warrant for the abatement of the nuisance may issue as if the same had not been stayed.

7.48.050 MORAL NUISANCES - DEFINITIONS

The definitions set forth in this section shall apply throughout this chapter as they relate to moral nuisances.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community shandards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts or describes patently

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(D) "Matter" means a motion picture film or a publication or both.

(E) "Moral nuisance" means a nuisance which is injurious to public morals.

(F) "Motion picture film" shall include

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Moral nuisance" means a nuisance which is injurious to public morals.

(6) "Motion picture film" shall include

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(5) video tape or any other medium used to electronically reproduce images on a screen.

(G) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(H) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(I) "Publication" shall include any

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(7) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(8) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(9) "Publication" shall include any

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(J) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [I.C., § 52-103, as added by 1976, ch. 82, § 2, p. 270.]

52-104. MORAL NUISANCES - <TYPES>.-- The following are declared to be moral nuisances:

(A) Any and every place in the state where lewd films are publicly exhibited as

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [Amended by Initiative Measure No. 335 § 1, approver November 8, 1977.]

7.48.052 MORAL NUISANCES ><

The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

a regular course of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(C) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(D) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(E) Any and every lewd publication possessed at a place which is a moral nuisance under this section; <and>

(F) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, or prostitution, and every such place in or

a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(4) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a moral nuisance under this section; ><

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, or prostitution, and every such place in or

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

upon which acts of lewdness, assignation, or prostitution, are held or occur. <[I.C., § 52-104, as added by 1976, ch. 82, § 2, p. 270.]>

52-106. MORAL NUISANCES - BUILDING WHERE GAMBLING IS CARRIED ON.-- Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided by law. [I.C., § 52-106, as added by 1976. ch. 82, § 2, p. 270.]

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

upon which acts of lewdness, assignation, or prostitution, are conducted, permitted, carried on, continued, or exist; ><

(7) All public houses or places of resort where illegal gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, illegal gambling, fighting, or breaches of the peace are carried on or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted. [Added by Initiative Measure No. 335 § 2, approved November 8, 1977.]

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-105. MORAL NUISANCES - PERSONAL PROPERTY - KNOWLEDGE OF NUISANCE.-- The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(A) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance.

(B) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance.

(C) The furniture >< and <movable> contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in section 52-405, Idaho Code, upon the place, or its manager, <or> acting manager, or person then in charge, all

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.054 MORAL NUISANCES - PERSONAL PROPERTY - EFFECTS OF NOTICE

The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance;

(3) The furniture, <fixtures,> and >< contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in RCW 7.48.064 upon the place or its manager, >< acting manager, or person then in charge, all such persons are deemed to

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

such parties are deemed to have knowledge of the acts, conditions or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [I.C., § 52-105, as added by 1976, ch. 82, § 2, p. 270.]

52-401. CUMULATIVE REMEDY. -- In addition to any other remedy provided by law, any act, occupation, structure or thing which is a moral nuisance, may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing may be enjoined, as in this chapter provided. [I.C., § 52-401, as added by 1976, ch. 82, § 4, p. 270.]

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

have knowledge of the acts, conditions, or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [Added by Initiative Measure No. 335 § 3, approved November 8, 1977.]

7.48.056 ABATE MORAL NUISANCE - ENJOIN OWNER

In addition to any other remedy provided by law, any act, occupation, structure, or thing which is a moral nuisance may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing may be enjoined as provided in this chapter. [Added by Initiative Measure No. 335 § 4, approved

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-402. <WHO MAY> MAINTAIN ACTION ><.-- The attorney general, prosecuting attorney, >< or any <private resident> citizen of the county may maintain an action of an equitable nature, as relator, in the name of the state of Idaho, to abate a moral nuisance, >< perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient

...AND WASHINGTON INITIATIVE MEASURE NO. 335: November 8, 1977.]

7.48.058 >< MAINTAINING ACTION <TO ABATE MORAL NUISANCE - BOND>

The attorney general, prosecuting attorney, <city attorney, city prosecutor,> or any >< citizen of the county may maintain an action of an equitable nature in the name of the state of Washington upon the relation of such attorney general, prosecuting attorney, city attorney, city prosecutor, or citizen, to abate a moral nuisance, <to> perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars <($500)>, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the restraining order or temporary injunction ought not to have been granted. <The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action>. No bond shall be required of the prosecuting attorney or the attorney general, >< and no action shall be maintained against the public official for his official action when brought in good faith. [I.C., § 52-402,

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

court or clerk thereof, in the sum of not less than five hundred dollars >, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, and the court finds there was no reasonable grounds or cause for said action and the case is dismissed for that reason before trial or for want of prosecution. > No bond shall be required of the attorney general, prosecuting attorney, <city attorney, or city prosecutor,> and no action shall be maintained against such public official for his official action when brought in good faith. [Added by Initiative Measure No. 335 § 5, approved November 8, 1977.]

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

as added by 1976, ch. 82, § 4, p. 270.]

52-403. PLEADINGS - JURISDICTION - VENUE - APPLICATION FOR TEMPORARY INJUNCTION.-- The action, provided for in this chapter, shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten <(10)> days after the filing. [I.C., § 52-403, as added by 1976, ch. 82, § 4, p. 270.]

52-404. ORDER RESTRAINING REMOVAL OF PERSONAL PROPERTY FROM PREMISES - SERVICE -

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.060 MORAL NUISANCE - JURISDICTION - FILING A COMPLAINT

The action provided for in RCW 7.48.058 shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten >< days after the filing. [Amended by Initiative Measure No. 335 § 6, approved November 8, 1977.]

7.48.062 MORAL NUISANCE - RESTRAINING ORDER - VIOLATIONS

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

PUNISHMENT.-- Where such application for a temporary injunction is made, the court >< may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that, pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions <thereafter> may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

Where such application for a temporary injunction is made, the court <or judge thereof> may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions >< may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. [I.C., § 52-404, as added by 1976, ch. 82, § 4, p. 270.]

52-405. NOTICE OF HEARING ON TEMPORARY INJUNCTION - CONSOLIDATION ><.-- A copy of the complaint, together with a notice of

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect. [Added by Initiative Measure No. 335 § 7, approved November 8, 1977.]

7.48.064 MORAL NUISANCE - HEARING - NOTICE - CONSOLIDATION <WITH TRIAL>

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five (5) days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in section 52-404, Idaho Code, in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter or course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least three days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in RCW 7.48.062 in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter or course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

Any evidence received upon an application for a temporary injunction which would be admissible upon the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [I.C., § 52-405, as added by 1976, ch. 82, § 4, p. 270.]

52-406. RIGHT TO POSSESSION OF REAL PROPERTY AND PERSONAL PROPERTY AFTER HEARING ON THE TEMPORARY INJUNCTION - CONDITIONS FOR AVOIDANCE OF TEMPORARY FORFEITURE.-- If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court ><, the court >< shall issue a temporary injunction, without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [Added by Initiative Measure No. 335 § 8, approved November 8, 1977.]

7.48.066 FINDING OF MORAL NUISANCE - ORDERS

If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court <or judge>, the court <or judge> shall issue a temporary injunction, without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

is granted, it further appears that the person owning, in control ><, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein and shall forthwith issue an order closing such place against its use for any purpose until >< final decision is rendered on the application for a permanent injunction, unless:

(1) the person owning, in control ><, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person, or

(2) the owner of such property, as a

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

is granted, it further appears that the person owning, in control <of>, or in charge of the nuisance so enjoined had received three days notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein, and shall forthwith issue an order closing such place against its use for any purpose until <a> final decision is rendered on the application for a permanent injunction, unless:

(1) The person owning, in control <of>, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person; or

(2) The owner of such property, as a

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

"good faith" lessor, has taken action to void said lease as is authorized by section 52-414, Idaho Code.

Such order shall also continue in effect for such further period >< the order, authorized in section 52-404, Idaho Code, restraining the removal of personal property or, if not so issued, shall include such an order restraining <for such period> the removal or interference with the personal property and contents located therein ><. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in section 52-404, Idaho Code.

Such order shall also require such persons to show cause within thirty <(30)> days why such closing order should not be made permanent, as provided for in section 52-412, Idaho Code. [I.C., § 52-406, as

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

"good faith" lessor, has taken action to void said lease as is authorized by RCW 7.48.085.

Such order shall also continue in effect for such further period <as> the order authorized in RCW 7.48.062 provides. If no order has been issued pursuant to RCW 7.48.062, then an order restraining >< the removal or interference with the personal property and contents located therein <shall be issued>. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in RCW 7.48.062.

Such order shall also require such persons to show cause within thirty >< days why such closing order should not be made permanent, as provided for in RCW 7.48.078. [Added by Initiative Measure

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

added by 1976, ch. 82, § 4, p. 270.]

52-407. RIGHT TO POSSESSION OF REAL PROPERTY AND PERSONAL PROPERTY AFTER FINDING OF PUBLIC NUISANCE - CONDITIONS FOR REENTRY AND REPOSSESSION.-- The owner of any real or personal property to be closed or restrained or which has been closed or restrained, may appear between the filing of the complaint and >< the hearing on the application for a permanent injunction,

(continued on next page.)

...AND WASHINGTON INITIATIVE MEASURE NO. 335: No. 335 § 9, approved November 8, 1977.]

7.48.068 ABATEMENT OF MORAL NUISANCE BY OWNER - EFFECT ON INJUNCTION

The owner of any real or personal property to be closed or restrained, or which has been closed or restrained, may appear after the filing of the complaint and <before> the hearing on the application for a permanent injunction.

(continued on next page.)

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

and upon payment of all cost incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, <until the decision of the court is rendered on the application for a permanent injunction, then> the court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of the use <of such personal property> as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction,

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

The court, if satisfied on the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of its use >< as a nuisance, and that with reasonable care and diligence such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept,

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall discharge said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected ><. [I.C., § 52-407, as added by 1976, ch.82, § 4, p. 270.]

52-408. >< PRIORITY OF ACTION ><.-- The action provided for in this chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

>< refrain from issuing any order closing such real property or restraining the emoval or interference with such personal property, and, if such temporary injunction has already been issued, shall cancel said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected <by law>. [Added by Initiative Measure No. 335 § 10, approved November 8, 1977.]

7.48.070 <MORAL NUISANCE - > PRIORITY OF ACTION <ON CALENDAR>

The action provided for in RCW 7.48.058 shall be set down for trial at the first term of the court and shall have precedence over all other cases except

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

[I.C., § 52-408, as added by 1976, ch. 82, § 4, p. 270]

52-409. EVIDENCE.-- In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place, is admissible for the purpose of proving the existence of said nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance. [I.C., § 52-409, as added by 1976, ch 82, § 4, p. 270.]

52-410. >< EVIDENCE OF REPUTATION >< ADMISSIBLE.-- At all hearings upon the

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

crimes, election contests, or injunctions. [Amended by Initiative Measure No. 335 § 11, approved November 8, 1977.]

7.48.072 MORAL NUISANCE - EFFECTS OF ADMISSION OR FINDING OF GUILT

In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place is admissible for the purpose of proving the existence of such nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining such nuisance. [Added by Initiative Measure No. 335 § 12, approved November 8, 1977.]

7.48.074 <MORAL NUISANCE -> EVIDENCE OF REPUTATION <-> ADMISSIBILITY

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [I.C., § 52-410, as added by 1976, ch 82, § 4, p. 270.]

52-411. >< COSTS ><.-- If the action is brought by a <private> person >< and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed for that reason before trial, or <if the action is dismissed> for want of prosecution, the costs >< may be taxed to such person.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [Added by Initiative Measure No. 335 § 13, approved November 8, 1977.]

7.48.076 <MORAL NUISANCE - TRIAL -> COSTS <- DISMISSAL - JUDGMENT>

If the action is brought by a >< person <who is a citizen of the county,> and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed before trial for that reason or >< for want of prosecution, the costs <, including attorney's fees,> may be taxed to such person.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere, <and> the entire expenses of such abatement, including attorney's fees, shall be recoverable by >< plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a <private> person ><, it shall not be <voluntarily> dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere. >< The entire expenses of such abatement, including attorney's fees, shall be recoverable by <the> plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a >< person <who is a citizen of the county>, it shall not be >< dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action should not to be dismissed, he may

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

attorney to prosecute said action to judgment at the expense of the county, and if the action is continued >< more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general <or> the prosecuting attorney ><, may be substituted for the complainant and prosecute said action to judgment. [I.C., § 52-411, as added by 1976, ch. 82, § 4, p. 270.]

52-412. CONTENT OF FINAL JUDGMENT AND ORDER.- If the existence of a nuisance is admitted or established in an action as provided for in this chapter ><, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued <for> more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general, >< the prosecuting attorney, <city attorney, or city prosecutor,> may be substituted for the complainant and prosecute said action to judgment. [Added by Initiative Measure No. 335 § 14, approved November 8, 1977.]

7.48.078 MORAL NUISANCE - JUDGMENT - PENALTIES - DISPOSAL PERSONAL PROPERTY

If the existence of a nuisance is admitted or established in an action as provided for in RCW 7.48.058 <or in a criminal proceeding>, an order of abatement shall be entered as a part of

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

conducting the nuisance, and not already released under authority of the court, as provided for in sections 52-406 and 52-407, Idaho Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and >< not be sold.

>¶<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and not already released under authority of the court as provided for in RCW 7.48.066 and 7.48.068, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and <shall> not be sold.

<Such judgment shall impose a penalty of three hundred dollars for the maintenance of such nuisance, which penalty shall be imposed against the person or persons found to have maintained the nuisance, and, in case any owner or agent of the building found to have had actual or constructive notice of the maintenance of such nuisance, against such owner or

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

Such order shall also require the renewal for one <(1)> year of any bond furnished by the owner of the real property, as provided in section 52-407, Idaho Code, or, if not so furnished, shall continue for one <(1)> year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one <(1)> year unless sooner released.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

agent, and against the building kept or used for the purposes of maintaining a moral nuisance, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of the county in which the judgment is had.>

Such order shall also require the renewal for one >< year of any bond furnished by the owner of the real property, as provided in RCW 7.48.068 or, if not so furnished, shall continue for one >< year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose and keeping it closed for a period of one >< year unless sooner released.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 52-407, Idaho Code.

Owners of unsold personal property and contents so seized must appear and claim the same within ten <(10)> days after such order of abatement is made, and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in RCW 7.48.068.

Owners of unsold personal property and contents so seized must appear and claim the same within ten >< days after such order of abatement is made, and prove innocence to the satisfaction of the court of any knowledge of such use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [I.C., § 52-412, as added by 1976, ch. 82, § 4, p. 270.]

52-413. COURT SHALL PUNISH OFFENDER FOR VIOLATION OF INJUNCTION <OR ORDER>.-- In case of the violation of any injunction <or closing order,> granted under >< this chapter, >< <or of a restraining order or the commission of any contempt of court in proceedings under this chapter>, the court >< may summarily try and punish the offender. ><

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [Added by Initiative Measure No. 335 § 15, approved November 8, 1977.]

7.48.080 MORAL NUISANCE - CONTEMPT FOR VIOLATION OF INJUNCTION ><

In case of the violation of any injunction >< granted under <the provisions of> RCW 7.48.050 through 7.48.100 <as now or hereafter amended,> >< the court <or judge> may summarily try and punish the offender. <The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. ><. [I.C., § 52-413, as added by 1976, ch. 82, § 4, p. 270.]

52-414. LEASE VOID IF BUILDING USED FOR LEWD PURPOSES.-- If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

defendant shall be arrested.> The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. <A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment.> [Amended by Initiative Measure No. 335 § 16, approved November 8, 1977.]

7.48.085 MORAL NUISANCE - PROPERTY OWNER MAY REPOSSESS

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of maintaing a moral nuisance, such use makes void at the option of the owner the lease or other

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [I.C., § 52-414, as added by 1976, ch. 82, § 4, p. 270.]

52-415. CIVIL PENALTY - FORFEITURE <- ACCOUNTING - LIEN AS TO EXPENSES OF ABATEMENT>.-- Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in section 52-104, Idaho Code, and all moneys and other considerations declared to be a moral nuisance under section 52-105, Idaho Code, are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such moneys

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

title under which he holds, and without any act of the owner causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [Added by Initiative Measure No. 335 § 17, approved November 8, 1977.]

7.48.090 MORAL NUISANCE - CONTRABAND - FORFEITURES ><

Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in RCW 7.48.052 and 7.48.054 and all moneys and other considerations declared to be a moral nuisance under RCW 7.48.056 are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited, or otherwise used. Such moneys may be traced to and shall be recoverable

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

may be traced to and shall be recoverable from persons who, under section 52-405, Idaho Code, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to this chapter ><, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare, public

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

from persons who, under RCW 7.48.064, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to RCW 7.48.050 through 7.48.100 <as now or hereafter amended>, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

health and public morals.

Where the action is brought pursuant to this chapter ><, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, <and> appeals therefrom, and other costs allowed on appeal.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [I.C., § 52-415, as added by 1976, ch. 82, § 4 p. 270.]

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

restitution for damages done to the public welfare, public health, and public morals.

Where the action is brought pursuant to RCW 7.48.050 through 7.48.100 <as now or hereafter amended>, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) Investigative costs;

(2) Court costs;

(3) Reasonable attorney's fees arising out of the preparation for, and trial of the cause, >< appeals therefrom, and other costs allowed on appeal;

(4) Printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [Amended by Initiative Measure No. 335 § 18, approved November 8, 1977.]

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-416. >< IMMUNITY ><. -- The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (1) has no financial interest in the place wherein he is so employed, >< and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this chapter ><, including pre-trial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [I.C., § 52-416, as added by 1976, ch. 82, § 4, p. 270.]

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.100 <MORAL NUISANCE -> IMMUNITY <OF CERTAIN MOTION PICTURE THEATRE EMPLOYEES>

The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, if such projectionist, usher, or ticket taker (1) has no financial interest in the place wherein he is so employed, <other than his salary,> and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under RCW 7.48.050 through 7.48.100 <as now or hereafter amended,> including pre-trial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

such matters. [Amended by Initiative Measure No. 355 § 19, approved November 8. 1977.]

7.48.120 NUISANCE DEFINED*

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

7.48.130 PUBLIC NUISANCE DEFINED*

A public nuisance is one which affects

* NOTE: §7.48.120 - .130 WERE NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>§<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

equally the rights of an entire community or neighborhood, >< although the extent of the >< damage >< may be unequal.

7.48.140 PUBLIC NUISANCES ENUMERATED*

It is a public nuisance:

(1) To cause or suffer the carcass of any animal or any offal, filth, or noisome substance to be collected, deposited, or to remain in any place to the prejudice of others;

(2) To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others;

* NOTE: §7.48.140 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>§<.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

(3) To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water;

(4) To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing places, and ways to burying places;

(5) To carry on the business of manufacturing gun powder, nitroglycerine, or other highly explosive substance, or mixing or grinding the materials therefor, in any building within fifty rods of any valuable building erected at the time such business may be commenced;

(6) To establish powder magazines near incorporated cities or towns, at a point different from that appointed by the corporate authorities of such city or town; or within fifty rods of any occupied dwelling house;

(7) To erect, continue, or use any

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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building, or other place, for the exercise of any trade, employment, or manufacture, which, by occasioning obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of individuals or of the public;

(8) To suffer or maintain on one's own premises, or upon the premises of another, or to permit to be maintained on one's own premises, any place where wines, spirituous, fermented, malt, or other intoxicating liquors are kept for sale or disposal to the public in contravention of law;

(9) For an owner or occupier of land, knowing of the existence of a well, septic tank, cesspool, or other hole or excavation ten inches or more in width at the top and four feet or more in depth, to fail to cover, fence or fill the same, or provide other proper and adequate

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

safeguards: Provided, That this section shall not apply to a hole one hundred square feet or more in area or one that is open, apparent, and obvious.

Every person who has the care, government, management, or control of any building, structure, powder magazine, or any other place mentioned in this section shall, for the purposes of this section, be taken and deemed to be the owner or agent of the owner or owners of such building, structure, powder magazine or other place, and, as such, may be proceeded against for erecting, contriving, causing, continuing, or maintaining such nuisance.

7.48.150 PRIVATE NUISANCE DEFINED*

Every nuisance not included in the definition of RCW 7.48.130 is private.

* NOTE: §7.48.150 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.160 AUTHORIZED ACT NOT A NUISANCE*

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

7.48.170 SUCCESSIVE OWNERS LIABLE*

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property caused by a former owner, is liable therefor in the same manner as the one who first created it.

7.48.180 ABATEMENT DOES NOT PRECLUDE ACTION FOR DAMAGES*

The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

* NOTE: §7.48.160 - .180 WERE NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.190 NUISANCE DOES NOT BECOME LEGAL BY PRESCRIPTION*

No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

7.48.200 REMEDIES*

The remedies against a public nuisance are: Indictment or information, a civil action, or abatement. The remedy by indictment or information shall be as regulated and prescribed in this chapter. Where a civil action for damage is resorted to, the practice shall conform to RCW 7.48.010 through 7.48.040.

7.48.210 CIVIL ACTION, WHO MAY MAINTAIN*

A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself but not

* NOTE: §7.48.190 - .210 WERE NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

otherwise.

7.48.220 ABATEMENT, BY WHOM*

A public nuisance may be abated by any public body or officer authorized thereto by law.

7.48.230 PUBLIC NUISANCE - ABATEMENT*

Any person may abate a public nuisance which is specially injurious to him by removing, or if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

7.48.240 CERTAIN PLACES OF RESORT DECLARED NUISANCES*

Houses of ill fame, kept for the purpose, where persons are employed for purposes of prostitution; all public

* NOTE: §7.48.220 - .240 WERE NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

houses or places of resort where gambling is carried on, or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, gambling, fighting or breaches of the peace are carried on, or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted, are nuisances, and may be abated, and the owners, keepers, or persons in charge thereof, and persons carrying on such unlawful business shall be punished as provided in this chapter. [Amended by Laws 1st Ex Sess 1973 ch 154 § 18.]

7.48.250 PENALTY - ABATEMENT*

Whoever is convicted of erecting, causing or contriving a public or common nuisance as described in this chapter, or

* NOTE: §7.48.250 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

at common law, when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided: Provided, That orders and warrants of abatement shall not be issued by justices of the peace.

7.48.260 WARRANT OF ABATEMENT*

When, upon indictment or information, complaint or action, any person is adjudged guilty of a nuisance, if it be in superior court the court may in addition to the fine imposed, if any, or to the judgment for damages or costs, for which a separate execution may issue, order that

* NOTE: §7.48.260 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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such nuisance be abated, or removed at the expense of the defendant, and after inquiry into and estimating, as nearly as may be, the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor: Provided, That if the conviction was had in a justice court, the justice of the peace shall not issue the order and warrant of abatement, but on application therefor, shall transfer the cause to the superior court which shall proceed to try the issue of abatement in the same manner as if the action had been originally commenced therein.

7.48.270 STAY OF WARRANT*

Instead of issuing such warrant, the court may order the same to be stayed upon motion of the defendant, and upon his

* NOTE: §7.48.270 WAS NOT AMENDED.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

entering into a bond in such sum and with such surety as the court may direct to the state, conditioned either that the defendant will discontinue said nuisance, or that within a time limited by the court, and not exceeding six months, he will cause the same to be abated and removed, as either is directed by the court, and upon his default to perform the condition of his bond, the same shall be forfeited, and the court, upon being satisfied of such default, may order such warrant forthwith to issue, and an order to show cause why judgment should not be entered against the sureties of said bond.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

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...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.280 COSTS OF ABATEMENT*

The expense of abating a nuisance, by virtue of a warrant, can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences, or other things that may be removed as a nuisance, may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof.

* NOTE: §7.48.280 WAS NOT AMENDED.

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

52-417. SEVERABILITY >‹.-- If any section, subsection, sentence, or clause of this act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this act. It is hereby declared that this act would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. [I.C., § 52-417, as added by 1976, ch. 82, § 4, p. 270.]

...AND WASHINGTON INITIATIVE MEASURE NO. 335:

7.48.900 SEVERABILITY <- INITIATIVE MEASURE NO. 335>

If any provision of this 1977 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected. [Enacted by Initiative Measure No. 335 § 20, approved November 8, 1977.]

Appendix B

(Reference: Amicus Curiae Brief at pg. 7, fn. 5
pg. 10, fn. 6
pg. 18, fn. 8)

A section by section comparison of the Idaho Moral Nuisance Statute with the North Carolina "Abatement of Nuisances" Statute

..... B-1 thru B-89

APPENDIX B

A SECTION BY SECTION COMPARISON OF

THE IDAHO MORAL NUISANCE STATUTE (IDAHO CODE § 52-101 THRU 52-417 EFFECTIVE JULY 1, 1976)

WITH

THE NORTH CAROLINA "ABATEMENT OF NUISANCES" STATUTE (CHAPTER 19, ARTICLE 1, NORTH CAROLINA GENERAL STATUTE) (EFFECTIVE AUGUST 1, 1977)

TEXT SYMBOLS:

>< WORDS AND/OR PHRASES ADDED IN OTHER STATUTE

<___> WORDS AND/OR PHRASES OMITTED IN OTHER STATUTE

____ WORDS AND/OR PHRASES DIFFERENT IN OTHER STATUTE

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

CHAPTER 1 - NUISANCES IN GENERAL

SECTION.

52-101. Nuisance defined.

52-102. Public Nuisance.

52-103. Moral Nuisances - Definitions.

52-104. Moral nuisances - Types.

52-105. Moral nuisances - Personal property - Knowledge of nuisance.

52-106. Moral nuisances - Building where gambling is carried on.

52-107. Private nuisance.

52-108. When not a nuisance.

52-109. Liability of successive owners for continuing nuisance.

52-110. Abatement does not preclude action.

52-111. Actions for nuisance.

CHAPTER 4 - MORAL NUISANCES - ACTION FOR INJUNCTION AND ABATEMENT

SECTION.

52-401. Cumulative remedy.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

CHAPTER 19

OFFENSES AGAINST PUBLIC MORALS.

ARTICLE 1.

ABATEMENT OF NUISANCES.

SEC.

19- 1. What are nuisances under this Chapter.

19- 1.1. Definitions.

19- 1.2. Types of nuisances.

19- 1.3. Personal property as a nuisance; knowledge of nuisance.

19- 1.4. Liability of successive owners for continuing nuisance.

19- 1.5. Abatement does not preclude action.

19- 2. [Repealed]

19- 2.1. Action for abatement; injunction.

19- 2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-402. Who may maintain action.

52-403. Pleadings - Jurisdiction - Venue - Application for temporary injunction.

52-404. Order restraining removal of personal property from premises - Service - Punishment.

52-405. Notice of hearing on temporary injunction - Consolidation.

52-406. Right to possession of real property and personal property after hearing on the temporary injunction - Conditions for avoidance of temproary forfeiture.

52-407. Right to possession of real property and personal property after finding of public nuisance - Conditions for re-entry and repossession.

52-408. Priority of action.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

19- 2.3. Temporary order restraining removal of personal property from premises; service; punishment.

19- 2.4. Notice of hearing on preliminary injunction; consolidation.

19- 2.5. Hearing on the preliminary injunction; issuance.

19- 3. Priority of action; evidence.

19- 4. Violation of injunction; punishment.

19- 5. Content of final judgment and order.

19- 6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease.

19- 7. How order of abatement may be canceled.

19- 8. Costs.

19- 8.1. Immunity.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-409. Evidence.

52-410. Evidence of reputation admissible.

52-411. Costs.

52-412. Content of final judgment and order.

52-413. Court shall punish offender for violation of injunction or order.

52-414. Lease void if building used for lewd purposes.

52-415. Civil penalty - Forfeiture - Accounting - Lien as to expenses of abatement.

52-416. Immunity.

52-417. Severability.

52-101. NUISANCE DEFINED.- Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

19- 8.2. Right of entry.

19- 8.3. Severability.

§ 19-1. WHAT ARE NUISANCES UNDER THIS CHAPTER.-- (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation,

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, or any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. [I.C., § 52-101, as added by 1976, ch. 82, § 2, p. 270.]

52-102. PUBLIC NUISANCE.- A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [I.C., § 52-102, as added by 1976, ch. 82, § 2, p. 270.]

52-106. MORAL NUISANCES - BUILDING WHERE GAMBLING IS CARRIED ON.- Any building, place, or the ground itself,

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided by law. [I.C., § 52-106, as added by 1976. ch. 82, § 2, p. 270.]

52-107. PRIVATE NUISANCE. - Every nuisance not defined by law as a public nuisance or a moral nuisance, is private. [I.C., § 52-107, as added by 1976, ch. 82, § 2, p. 270.]

52-108. WHEN NOT A NUISANCE.- Nothing which is done or maintained under the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C.S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

express authority of a statute can be deemed a nuisance. [I.C., § 52-108, as added by 1976, ch. 82, § 2, p. 270.]

52-103. <MORAL NUISANCES> - DEFINITIONS.- As used in Title 52, Idaho Code, relating to moral nuisances.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, >< or prostitution which occur on the premises.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

§ 19-1.1. >< DEFINITIONS.- As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

(1) "knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, <gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

(B) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(1) which the average person, applying contemporary community shandards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts <or describes> patently offensive representations <or descriptions> of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; <or>

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

Carolina Controlled Substances Act,> or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts >< patently offensive representations >< of:

1. Ultimate sexual acts, normal or perverted, actual or simulated ><;

2. Masturbation, excretory functions, or lewd exhibition of the genitals or

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

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>¶<.

Nothing herein contained is intended to include or proscribe >< any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(D) "Matter" means a motion picture film or a publication or both.

<(E) "Moral nuisance" means a nuisance which is injurious to public morals.>

(F) "Motion picture film" shall include

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

genital area.

<3. Masochism or sadism; or>

<4. Sexual acts with a child or animal.>

Nothing herein contained is intended to include or proscribe <any writing or written material, nor to include or proscribe> any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

>¶<

(5) "Motion picture film" shall include

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(5) Video tape or any other medium used to electronically reproduce images on a screen.

(G) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(H) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself ><.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, <but

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

(I) "Publication" shall include any book, magazine, <article,> pamphlet, <writing, printing,> illustration, >< picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(J) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. [I.C., § 52-103, as added by 1976, ch. 82, § 2, p. 270.]

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excluding a private dwelling place not used for a profit>.

(8) "Publication" shall include any book, magazine, >< pamphlet, >< illustration, <photograph,> picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-104. <MORAL> NUISANCES - TYPES-- The following are declared to be <moral> nuisances ><:

(A) Any and every place in the state where lewd films are publicly exhibited as a >< regular course of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(C) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a <moral> nuisance under this section;

(D) Any and every place of business in

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

§ 19-1.2. >< TYPES OF NUISANCES.-- The following are declared to be >< nuisances <wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved>:

(1) Any and every place in the State where lewd films are publicly exhibited as a <predominant and> regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a >< nuisance under this Article;

(4) Any and every place of business in

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

the state in which lewd publications constitute a principal >< part of the stock in trade;

(E) Any and every lewd publication possessed at a place which is a <moral> nuisance under this section; <and>

(F) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, >< or prostitution, and every such place in or upon which acts of lewdness, assignation,

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

the State in which lewd publications constitute a principal <or substantial> part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a >< nuisance under this Article; ><

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, <gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act,> or prostitution, and every such place in or upon which acts of lewdness, assignation,

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>< or prostitution, are held or occur. [I.C., § 52-104, as added by 1976, ch. 62, § 2, p. 270.]

52-105. <MORAL NUISANCES> - PERSONAL PROPERTY >< - KNOWLEDGE OF NUISANCE. --The following are also declared to be <moral> nuisances, as personal property used in conducting and maintaining a <moral> nuisance ><:

(A) All moneys paid as admission price to the exhibition of any lewd film found to be a <moral> nuisance.

(B) All valuable consideration received for the sale of any lewd publication which is found to be a <moral> nuisance.

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<gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act,> or prostitution, are held or occur. (1977, c. 819, s. 3.)

§ 19-1.3. >< PERSONAL PROPERTY <AS A NUISANCE>; KNOWLEDGE OF NUISANCE. - The following are also declared to be >< nuisances, as personal property used in conducting and maintaining a >< nuisance <under this Chapter>:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a >< nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

(C) >< The furniture and movable contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in section 52-405, Idaho Code, upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the acts, conditions or things which make such place a moral nuisance. Where the circumstantial

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>< nuisance;

(3) <All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances proscribed under the North Carolina Controlled Substances Act, as well as> the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circum-

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

proof warrants a determination that a person had knowledge of the <moral> nuisance prior to such service of process, the court shall make such finding. [I.C., § 52-105, as added by 1976, ch. 82, § 2, p. 270.]

52-109. LIABILITY OF SUCCESSIVE OWNERS FOR CONTINUING NUISANCE.-- >< Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one (1) who first created it. [I.C., § 52-109, as added by 1976, ch. 82, § 2, p. 270.]

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stantial proof warrants a determination that a person had knowledge of the >< nuisance prior to such service of process, the court <u>may</u> make such finding. (1977, c. 819, s. 3.)

§ 19-1.4. LIABILITY OF SUCCESSIVE OWNERS FOR CONTINUING NUISANCE.-- <<u>After notice of a temporary restraining order, preliminary injunction, or permanent injunction,</u>> every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-110. ABATEMENT DOES NOT PRECLUDE ACTION.-- The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [I.C., § 52-110, as added by 1976, ch. 82, § 2, p. 270.]

<52-111. ACTIONS FOR NUISANCE. -- Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

§ 19-1.5. ABATEMENT DOES NOT PRECLUDE ACTION.-- The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existance. (1977, c. 819, s. 3.)

>§<.

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nuisance may be enjoined or abated, as well as damages recovered. [I.C., § 52-111, as added by 1976, ch. 82, § 2, p. 270.]>

<52-401. CUMULATIVE REMEDY. -- In addition to any other remedy provided by law, any act, occupation, structure or thing which is a moral nuisance, may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing may be enjoined, as in this chapter provided. [I.C., § 52-401, as added by 1976, ch. 82, § 4, p. 270.]

52-402. WHO MAY MAINTAIN ACTION.-- >< The attorney general, prosecuting attorney, or any private <resident> citizen of the county may maintain an >< action <of an equitable nature, as relator,> in the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

>§<.

§ 19-2.1. ACTION FOR ABATEMENT; INJUNCTION.-- <Wherever a nuisance is kept, maintained, or exists, as defined in this Article,> the Attorney General, district attorney, or any private ><

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

name of the state of Idaho, to abate a <moral> nuisance, >< perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a <moral> nuisance ><.

If such action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars ($500), to secure to the party enjoined the damages he may

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

citizen of the county may maintain a <civil> action >< in the name of the State of North Carolina to abate a >< nuisance <under this Chapter>, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a >< nuisance <under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter>.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the >< restraining order or temporary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the attorney general, and no action shall be maintained against the public official for his official action <when brought in good faith>. [I.C., § 52-402, as added by 1976, ch. 82, § 4, p. 270.]

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the <temporary> restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action ><. (1977, c. 819, s. 4.)

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-403. PLEADINGS - JURISDICTION - VENUE - APPLICATION FOR TEMPORARY INJUNCTION. -- The action, provided for in this chapter, shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, <or to a judge thereof,> who shall grant a hearing within ten <(10)> days after the filing >< . [I.C., § 52-403, as added by 1976, ch. 82, § 4, p. 270.]

52-404. >< ORDER RESTRAINING REMOVAL OF PERSONAL PROPERTY FROM PREMISES - SERVICE - PUNISHMENT.-- Where such application for a temporary injunction is made, the court

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

§ 19-2.2. PLEADINGS; JURISDICTION; VENUE; APPLICATION FOR PRELIMINARY INJUNCTION.-- The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a preliminary injunction may be made to the court in which the action is filed, >< which court shall grant a hearing within 10 >< days after the filing <of said application>. (1977, c. 819, s. 4.)

§ 19-2.3. <TEMPORARY> ORDER RESTRAINING REMOVAL OF PERSONAL PROPERTY FROM PREMISES; SERVICE; PUNISHMENT.-- Where such application for a preliminary

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

may, on application of the complainant showing good cause, issue an ex parte >< restraining order, >< restraining the defendant and all other persons from removing or in any manner interfering with >< the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court <or judge> granting or refusing such temporary injunction and until <the> further order of the court thereon, except that, pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions >< thereafter may be required.

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injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte <temporary> restraining order <in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and> restraining the defendant and all other persons from removing or in any manner interfering with <any evidence specifically described, or in any manner removing or interfering with> the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court >< granting or refusing such preliminary injunction and until >< further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions <involving alleged

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

>¶<.

<The> >< restraining order >< may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such

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obscene or lewd matter> thereafter shall be required.

<Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.>

>< <In the event a temporary> restraining order <is issued, it may be served in accordance with the provisions of G.S. 1A-1, Rule 4, or> may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a

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place, or by <both> such >< delivery and posting. The officer serving such >< restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such >< restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. [I.C., § 52-404, as added by 1976, ch. 82, § 4, p. 270.]

52-405. NOTICE OF HEARING ON TEMPORARY INJUNCTION - CONSOLIDATION.-- A copy of

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by >< such <service under said Rule 4,> delivery and posting. The officer serving such <temporary> restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such <temporary> restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

§ 19-2.4. NOTICE OF HEARING ON PRELIMINARY INJUNCTION; CONSOLIDATION.-- A

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five <(5)> days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in section 52-404, Idaho Code, in the case of a >< restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter or course >< .

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five >< days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in G.S. 19-2.3 in the case of a <temporary> restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter or course <until the hearing>.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible upon the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [I.C., § 52-405, as added by 1976, ch. 82, § 4, p. 270.]

52-406. <RIGHT TO POSSESSION OF REAL PROPERTY AND PERSONAL PROPERTY AFTER> HEARING ON THE TEMPORARY INJUNCTION >< - <CONDITIONS FOR AVOIDANCE OF TEMPORARY FORFEITURE.-- If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a temporary injunction, <without additional bond,> restraining the defendant and any other person from continuing the nuisance >< .

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application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

§ 19-2.5. >< HEARING ON THE PRELIMINARY INJUNCTION; <ISSUANCE> ><.-- If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction >< restraining the defendant and any other person from continuing the nuisance <and effectually enjoining its use thereafter for the purpose of conducting any such nuisance>. (1977, c. 819, s. 4.)

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< If at the time the temporary injunction is granted, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein and shall forthwith issue an order closing such place against its use for any purpose until final decision is rendered on the application for a permanent injunction, unless:

(1) the person owning, in control, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

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such person, or

(2) the owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by section 52-414, Idaho Code.

Such order shall also continue in effect for such further period the order, authorized in section 52-404, Idaho Code, restraining the removal of personal property or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in section 52-404, Idaho Code.

Such order shall also require such persons to show cause within thirty (30) days why such closing order should not be made permanent, as provided for in section

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

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COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-412, Idaho Code.> [I.C., § 52-406, as added by 1976, ch. 82, § 4, p. 270.]

<52-407. RIGHT TO POSSESSION OF REAL PROPERTY AND PERSONAL PROPERTY AFTER FINDING OF PUBLIC NUISANCE - CONDITIONS FOR REENTRY AND REPOSSESSION.-- The owner of any real or personal property to be closed or restrained or which has been closed or restrained, may appear between the filing of the complaint and the hearing on the application for a permanent injunction, and upon payment of all cost incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, until the decision of

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

>3<.

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the court is rendered on the application for a permanent injunction, then the court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall discharge said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property, under this section,

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>§<.

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shall not release it from any judgment, lien, penalty, or liability to which it may be subjected. [I.C., § 52-407, as added by 1976, ch.82, § 4, p. 270.]>

52-408. PRIORITY OF ACTION. >< -- >< The action provided for in this chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. <[I.C., § 52-408, as added by 1976, ch. 82, § 4, p. 270]>

52-409. <EVIDENCE.--> >< In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, <or> assignation >< at any such place, is admissible for the purpose of proving the existence of said nuisance, and is <prima

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§ 19-3. PRIORITY OF ACTION; <EVIDENCE>.--<(a)> The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. ><

>< <(b)> In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, >< prostitution, <gambling, the illegal possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act,> at

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

facie> evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance. <[I.C., § 52-409, as added by 1976, ch 82, § 4, p. 270.]>

52-410. <EVIDENCE OF REPUTATION ADMISSIBLE.-> >< At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [I.C., § 52-410, as added by 1976, ch 82, § 4, p. 270.]

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any such place, is admissible for the purpose of proving the existence of said nuisance, and is >< evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance. ><

>< <(c)> At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C.S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

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52-411. COSTS.-- If the action is brought by a private person and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed for that reason before trial, or if the action is dismissed for want of prosecution, the costs may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere, and the entire expenses of such abatement, including attorney's fees, shall be recoverable by plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a private person, it shall not be voluntarily

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§ 19-8. COSTS.-- The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C.S., s. 3187; 1977, c. 819, s. 8.)

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dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. [I.C., § 52-411, as added by 1976, ch. 82, § 4, p. 270.]

52-412. CONTENT OF FINAL JUDGMENT AND ORDER.- If the existence of a nuisance is

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§ 19-5. CONTENT OF FINAL JUDGMENT AND ORDER.- If the existence of a nuisance is

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admitted or established in an action as provided for in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which >< order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court, as provided for in sections 52-406 and 52-407, Idaho Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter >< shall be destroyed and not be sold.

Such order shall also require the <renewal for one (1) year of any bond furnished by the owner of the real property, as provided in section 52-407, Idaho Code, or, if not so furnished, shall continue for one (1) year any closing

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admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which <judgment and> order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, <illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act> shall be destroyed and not be sold.

Such order may also require the >< effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

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order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the> effectual closing of the place against its use for any purpose, and keeping it closed for a period of one (1) year unless sooner released.

>¶<.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

<The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 52-407, Idaho Code.

Owners of unsold personal property and contents so seized must appear and claim the same within ten (10) days after such order of abatement is made, and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. <(Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C.S., s. 3184; 1977, c. 819, s. 6.)>

§ 19-7. HOW ORDER OF ABATEMENT MAY BE CANCELED.-- If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [I.C., § 52-412, as added by 1976, ch. 82, § 4, p. 270.]

52-413. <COURT SHALL PUNISH OFFENDER FOR> VIOLATION OF INJUNCTION <OR ORDER> >< .-- In case of the violation of any injunction <or closing order,> granted under >< this chapter, <or of a restraining order or the commission of any

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C.S., s. 3186.)

§ 19.4. >< VIOLATION OF INJUNCTION ><; <PUNISHMENT>.-- In case of the violation of any injunction >< granted under <the provisions of> this Chapter, >< the court, <or, in vacation, a judge thereof,> may summarily try and punish the offender. A

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

contempt of court in proceedings under this chapter,> the court >< may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. [I.C., § 52-413, as added by 1976, ch. 82, § 4, p. 270.]

52-415. CIVIL PENALTY - FORFEITURE - ACCOUNTING - LIEN AS TO EXPENSES OF ABATEMENT ><.-- Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in section 52-104, Idaho Code, and all moneys and other considerations declared to be a <moral> nuisance under section 52-105, Idaho Code, are <the> subject of forfeiture to the

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C.S., s. 3183.)

§ 19-6. CIVIL PENALTY; FORFEITURE; ACCOUNTING; LIEN AS TO EXPENSES OF ABATEMENT; <INVALIDATION OF LEASE>.-- Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations declared to be a >< nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are >< subject to forfeiture to the local

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such >< moneys may be traced to and shall be recoverable from persons who, under section 52-405, Idaho Code, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the >< defendants in legal proceedings brought pursuant to this chapter, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a <public> nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such <property including> moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the <defendant or> defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a >< nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally,

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare, <public health and public morals> ><.

Where the action is brought pursuant to this chapter, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to <the following:

(1) investigative costs.>

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; >< <provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction.> Where the action is brought pursuant to this article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to, >< reasonable attorney's fees and court costs ><.

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

(2) court costs.

(3) reasonable attorney's fees <arising out of the preparation for, and trial of the cause, and appeals therefrom, and other costs allowed on appeal.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [I.C., § 52-415, as added by 1976, ch. 82, § 4 p. 270.]>

<52-414. LEASE VOID IF BUILDING USED FOR LEWD PURPOSES.--> If >< a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, <or> prostitution, >< such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

>< If <it is judicially found after an adversary hearing pursuant to this Article that> a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, >< prostitution, <gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act,> such use makes void the lease or other

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

owner, <who may without process of law make immediate entry upon the premises>. [I.C., § 52-414, as added by 1976, ch. 82, § 4, p. 270.]

52-416. IMMUNITY.-- The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (1) has no financial interest in the place wherein he is so employed, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this chapter, including pre-trial

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner ><. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C.S., s. 3185; 1977, c. 819, s. 7.)

§ 19-8.1. IMMUNITY.-- The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [I.C., § 52-416, as added by 1976, ch. 82, § 4, p. 270.]

>§<.

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

<§ 19-8.2. RIGHT OF ENTRY.-- Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resourses, upon presenting appropriate credentials to the owner, operator, or agent in charge of a place described in G.S. 19-1.2, are authorized to enter without delay and at any reasonable time any such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)>

COMPARISON OF IDAHO MORAL NUISANCE STATUTE:...

52-417. SEVERABILITY.-- If any section, subsection, sentence, or clause of this act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this act. It is hereby declared that this act would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. [I.C., § 52-417, as added by 1976, ch. 82, § 4, p. 270.]

...AND N. CAROLINA "ABATEMENT OF NUISANCES" STATUTE:

§ 19-8.3. SEVERABILITY.-- If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or claues thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)

Appendix C

(References: Amicus Brief at pg. 7
pg. 18, footnote 8)

Opinion of the North Carolina Supreme Court in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (Jan. 4, 1979)

..... C-1 thru C-78

IN THE SUPREME COURT OF NORTH CAROLINA

STATE of North Carolina ex rel. William H. ANDREWS, District Attorney for the Fourth District of North Carolina,	)	No. 23
v.	)	
CHATEAU X, INC., a South Carolina Corporation, et al.	)	Filed
	)	Jan. 4, 1979

On 12 December 1977 the State, through William H. Andrews, District Attorney for the Fourth District, filed a complaint against defendants, a South Carolina corporation doing business in Jacksonville, North Carolina and its officers and employees. The complaint alleged that defendants maintained a business, Chateau X Theater and Bookstore, for the purpose of illegal exhibitions and sales to the public of obscene and lewd films and publications as a regular and predominant course of business. Among other relief not relevant to this appeal, it prayed that Chateau X be declared a nuisance under Chapter 19 of North Carolina

General Statutes. The State also asked that an injunction issue ordering that defendants be "perpetually enjoined from maintaining, using, continuing, owning or leasing said place known as Chateau X Theater and Bookstore . . . as a nuisance" and "any place in the State of North Carolina as a nuisance."

On 20 December 1977 defendants made a motion to dismiss the action or, in the alternative, to continue it. They based this motion on the fact that there was a declaratory judgment action pending in the United States District Court for the Eastern District of North Carolina to test the constitutionality of Chapter 19. On 4 January 1978 defendants filed their answer along with a motion to dismiss the State's complaint on the ground that Chapter 19 is unconstitutional. After argument, the trial court denied defendants' motion.

The parties, by mutual stipulation, waived a jury trial. Trial was conducted before the judge beginning on 4 January 1978.

At trial the State introduced twenty exhibits into evidence without objection by defendants. Nineteen of these were copies of magazines and films possessed for sale or shown by Chateau X. State's Exhibit Number 20 was an inventory of materials found at that operation on 12 December 1977.

The trial judge personally viewed State's Exhibit Number 15, a film called "Airline Cockpit", and State's Exhibit Number 3, a magazine entitled "Spread Your Legs." The parties mutually stipulated that all the films and magazines listed in the inventory, State's Exhibit Number 20, "contain substantially similar material" as is found in State's Exhibit Number 15 and State's Exhibit Number 3.

The defendants presented no evidence.

The parties stipulated, however, "(t)hat if the defendants would testify, the evidence would indicate that the motion pictures exhibited and the books distributed and sold were done to consenting adults".

The trial judge found that State's Exhibits Numbers 15 and 3 are obscene, that the remainder of the nineteen films and magazines introduced into evidence are obscene, and that all the materials listed in the inventory are obscene. He held that all the above films and magazines are nuisances. He also declared Chateau X itself to be a nuisance under Chapter 19.

The judge ordered that all the material listed on the inventory, State's Exhibit Number 20, be confiscated and destroyed. He enjoined the defendants from exhibiting or selling any of these items. The defendants also were enjoined from selling or showing any other obscene matter in the

future which depicted certain specific sexual conduct listed in the order.

In his final order the trial judge interpreted a part of G.S. 19-5 as authorizing the actual closing of a business after it had been declared a nuisance. He held this portion unconstitutional.

Both the defendants and the State gave timely notice of appeal from the trial court's final judgment.

On 24 April 1978 the parties petitioned this Court pursuant to G.S. 7A-31(b) for review prior to it being determined by the Court of Appeals. We allowed the petition on 8 May 1978.

Atty. Gen. Rufus L. Edmisten by Senior Deputy Atty. Gen. Andrew A. Vanore, Jr., Asst. Gen. Marvin Schiller and I. Beverly Lake, Jr., Raleigh, for the State.

Bailey & Raynor by Edward G. Bailey and Frank W. Erwin, Jacksonville

Arthur M. Schwartz, P. C. by Neil Ayervais, Denver, Colo., for defendants.

COPELAND, Justice.

This case concerns the statutory construction and constitutionality of Chapter 19 of North Carolina General Statutes. For the reasons set out below, we have determined that Chapter 19 as interpreted and applied in this case is constitutional; therefore, the judgment of the trial court is affirmed.

Both parties in this action have brought up assignments of error to this Court. The State is challenging certain interpretations and applications of Chapter 19 by the court below. As the resolution of these issues affects the defendants' constitutional questions, we will consider the State's assignments of error on cross-appeal first.

The core of the controversy in this case stems from that part of the trial court's order that enjoins the defendants

from selling or showing obscene matter that is not listed on the inventory. This portion of the order states:

"2. The defendants . . . are hereby enjoined and restrained from:

* * * * * * * *

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum,

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation.

e. Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum,

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation."

The State contests two aspects of the above injunction. Both of them contain the argument that the judge did not go far enough.

The State first claims the trial court erred by enjoining films and publications showing only "enlarged" exhibits of the genitals during sexual intercourse. It argues that the court was required to prohibit the sale of matter depicting any genitals, enlarged or not, because of the mandates of G.S. 19-5, which reads in part: "If the existence of a nuisance is admitted or established . . . an order of abatement shall be entered as part of the judgment in the case." (Emphasis supplied.) Apparently the State is contending that once a business has been established as a nuisance, the judge is required to enjoin the future distribution of any and all obscene matter as defined by G.S. 19-1.1(2).[1] We do not agree.

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(1) G.S. 19-1.1(2) states:
"Lewd matter" is synonymous with "obscene matter" and means any matter:
(a) Which the average person, applying
(This footnote is continued on the next page)

The trial judge necessarily must be given some discretion in formulating his abatement order. The defendants will be subject to contempt of court if they violate the injunction; therefore, it is necessary that they be put on notice as to exactly what material they can and cannot show or sell in the future. See generally D. DOBBS, REMEDIES §2.4 (1973); Developments in the Law-Injunctions, 78 Harv.L. Rev. 994, 1064 (1965). A judge has a duty to supply this

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contemporary community standards would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

specificity. Rule 65(d) of the North Carolina Rules of Civil Procedure states that "(e)very order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined."

The Legislature must have intended for judges to have some discretion in abating nuisances. "(L)egislative intent is usually ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978). (Emphasis deleted.)

Chapter 19 as applied to obscene matter treads near the area of free speech. The sanctions for disobeying an abatement order could be severe. This Court need not decide

today whether a judge must always issue a general injunction, such as this one, against selling or exhibiting obscene matter not actually before the court. See D. Dobbs, supra at §2.11 note 22. We do hold, however, that if such an order does issue, the trial court has some discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and he has the duty to specifically warn the defendant of the prohibited conduct. This assignment of error is overruled.

The State next argues that the trial court's order was erroneous because it enjoined the defendants from selling obscene matter only when such material "constitute a principal or substantial part of (their) stock in trade." It contends that the judge was required to restrain the defendants from selling any lewd matter at all, whether or not it made up a large part of defendants'

inventory.

A careful reading of the statute refutes this argument. As the State points out, G.S. 19-12 [2] defines nuisances in terms

(2) G.S. 19-1.2. Types of nuisances. - The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;

(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal

(This footnote is continued on the next page)

of businesses that regularly display or sell lewd material and the obscene matter itself. However, G.S. 19-1.2(5) states that a lewd publication is a nuisance only when "possessed at a place which is a nuisance." In order for a bookstore to be a nuisance, the lewd publications must "constitute a principal or substantial part of the stock in trade."

Thus, not every isolated obscene publication is a nuisance that can be abated under G.S. 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can

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possession or sale of narcotic drugs as defined in the North Carolina Controlled Sustances Act, or prostitution are held or occur. (1977, c. 819, s. 3).

be abated. This assignment of error is overruled.

The trial court determined that a part of G.S. 19-5, stating that the judge's final order "may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance," authorizes the complete closing of a theater or bookstore once it has been declared a nuisance under Chapter 19. It held that portion ineffectual in nuisance actions dealing with obscene matter because such a closing would be an unconstitutional prior restraint on free speech. The State concedes in its brief and in its argument before this Court that any complete closing of a business for past sales of obscene material would constitute illegal prior restraint. We agree. See Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Other

states have so held. See, e.g., Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So.2d 480 (La. 1973).

The State contends, however, that the trial court erred in interpreting G.S. 19-5 as authorizing such a complete closing. That issue is not properly before the Court at this time. This interpretation of the statute was not excepted to by the State, and it also was not included in its grouping of exceptions and assignments of error in the record on appeal.

Under Rule 10 of the Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." This mandate is subject to various

exceptions, none of which are relevant here. The State is as much bound by these Rules as other parties before the courts of this State. Thus, we do not now decide whether G.S. 19-5 does authorize a judge to completely close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material.

We turn now to defendants' assignments of error. At the outset, it is important to note what issues are not before this Court. The trial judge found all the items listed in the inventory, totaling over five hundred different films and magazines, to be legally obscene. Defendants do not contest this finding. Furthermore, from a cursory examination of some of that matter, suffice it to say that it is, in the words of Chief Justice Burger, "offensive to the point of being nauseous." Kaplan v. California, 413 U.S. 115, 117, 93 S.Ct. 2680,

2683, 37 L.Ed.2d 492, 496 (1973). Thus, we are dealing here not with borderline obscenity but rather with patently hard-core pornography.

Secondly, the defendants do not object to that provision of the court's order restraining them from selling or exhibiting the material before the court. In essence, then the defendants are attacking only the statute itself and that portion of the final order enjoining them from selling or showing obscene matter not before the court. We now turn to these contentions.

Defendants first assert the trial court erred in denying their motion to dismiss the State's complaint before trial. Although it is somewhat unclear, apparently they argue that Chapter 19 of North Carolina General Statutes is unconstitutional on its face, thereby invalidating any action taken pursuant to it.

The defendant contend that the act in question is unconstitutional per se in two respects. First, they assert G.S. 19-5 authorizes the complete closing of a business in violation of the first amendment right of free speech. As stated above, that issue is not being decided by the Court at this time. Assuming, however, that G.S. 19-5 does allow such an illegal action, defendant's position is still untenable.

When only part of a statute is unconstitutional, the constitutional portions will still be given effect as long as they are severable from the invalid provisions. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964). To determine whether the portions are in fact divisible, the courts first see if the portions remaining are capable of being enforced on their own. They also look to legislative intent,

particularly to determine whether that body would have enacted the valid provisions if the invalid ones were omitted. See Hobbs v. Moore County, 267 N.C. 665, 149 S.E.2d 1 (1966).

We find from an exmaination of the statute itself that Chapter 19 is sufficiently complete when this provision of G.S. 19-5, allegedly authorizing the padlocking of a business, is deleted. As that portion relates to only one of many possible remedies a court can adopt in its final order, the statute can be adequately enforced without it. Furthermore, in G.S. 19-8.3 the Legislature has provided guidance for dealing with its intent in this area:

> "If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this

> Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences, or clauses might be adjudged to be unconstitutional, or for any other reason invalid."

This argument is without merit.

The defendants also contend Chapter 19 is unconstitutional on its face because it places the burden of proving non-obscenity on a defendant in a nuisance action. They claim that G.S. 19-1.1(2), set out above in footnote 1, requires the defendant to prove as an affirmative defense that the material before the court as a whole lacks "serious literary, artistic, political, educational, or scientific value."

In Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the

United States Supreme Court laid down the present constitutional test for obscenity.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic political, or scientific value." Id. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431. (Citation omitted.)

It is clear that the burden of proving obscenity must be on the State. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

It is equally well settled, however, that legislative acts are presumed to be constitutional, and this Court will interpret a statute so as to comport with constitutional mandates unless such a construction is unreasonable. See, e.g., Painter v. Board of Education, 288 N.C. 165, 217 S.E.2d 650 (1975); Highway Commission v. Industrial Center, 263 N.C. 230, 139 S.E.2d 253 (1964). Therefore, we find that the State is required to prove all the elements of obscenity found in G.S. 19-1.1(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value". The trial judge properly denied defendants' motion to dismiss the State's complaint.

The defendants next assert that the judge's final order dealing with illegal lewd matter not before the court enjoined

absolutely protected matter. They claim that the order restrained the sale of non-obscene material because it failed to require that the magazines and films enjoined be "patently offensive" in their depiction of the specified sexual conduct.

The Miller test of obscenity contains three elements, one of which is that the material depicts defined sexual conduct "in a patently offensive way." A comparison of that test and G.S. 19-1.1(2) shows that Chapter 19's definition of "lewd matter" almost exactly tracks the Supreme Court's language in Miller. In his final order, the trial court enjoined the defendants from showing or selling "illegal lewd matter" which "appeal to the prurient interest in sex," which is "(without) serious literary, artistic, political, educational, or scientific value," and which shows certain sexual conduct. Thus, although the order restated

almost all of the definition of obscenity in Miller and in G.S. 19-1.1(2), it did not specifically state that the sexual conduct being depicted be patently offensive."

This minor omission is not fatal to the injunction. Other courts have held it permissible for an injunction to include terms that are adequately defined in applicable statutes. See, e.g., Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508 (5th Cir. 1969); Wilson Finance Co. v. State, 342 S.W.2d 117 (Tex. Civ.App. 1960). In the case before us the trial judge enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in G.S. 19-1.1(2). Thus the constitutional requirements of Miller have been met, and defendants have been restrained from dealing in only legally obscene magazines and films and not ones protected by the first amendment. This assignment of error is overruled.

Defendants' main argument is that the judge's order restraining them from selling or exhibiting obscene matter not actually before the court is unconstitutional. They claim such action constitutes an illegal prior restraint in violation of their first amendment right of free speech.

The United States Supreme Court has repeatedly stated that the first and fourteenth amendments are not absolute. Even the greatly revered right to freedom of speech is subject to various exceptions, one of which is obscenity. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Miller v. California, supra, 413 U.S. at 23, 93 S.Ct. at 2614, 37 L.Ed.2d at 430. It is equally well settled that the states have a long-recognized legitimate interest in regulating obscenity in the commercial context, which has become

big business. See generally, Cook, the X-Rated Economy, Forbes, Vol. 122, No. 6, Sept. 18, 1978.

> "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446, 460 (1973).

A State can constitutionally attempt to control commercial obscencity through its criminal laws. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498

(1957). However, that is not the only avenue open to it.

> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts (a state) to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice." Kingsley Books v. Brown, 354 U.S. 436, 441, 77 S.Ct. 1325, 1327-1328, 1 L.Ed.2d 1469, 1473-74 (1957). See also

Times Film Corp. v. Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961). Of course, the legislature must choose those means that are within constitutional boundaries.

Defendants have concluded that because it is an injunction they are attacking, that remedy automatically constitutes a prior restraint. We note, however, that in this area prior restraint normally means when allegedly obscene material is seized or preliminarily enjoined before a judicial declaration of obscenity, see, e.g., Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); Kingsley Books v. Brown, supra, or when a person is required to submit material for the approval of a licensing body before it is allowed to be distributed or shown to the public. See, e.g., Times Film Corp. v. Chicago, supra; Kingsley International Pictures Corp.

v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959). In fact, we could find no decision by the United States Supreme Court that struck down an injunction such as this one or that even labelled one a prior restraint.

Assuming, however; that this injunction does fit the definition of a prior restraint, our inquiry as to its legality does not end there. For prior restraints are not per se unconstitutional. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). Rather, the courts must test its validity by its operation in practice, and they have looked to see how the statute differs in effect from a criminal law against selling obscene matter. Kingsley Books v. Brown, supra.

In Kingsley Books the Supreme Court compared a New York statute, authorizing a preliminary injunction against the

distribution of allegedly obscene matter for a short time pending trial, with a criminal obscenity law. In upholding that statute, that Court stated:

> "Criminal enforcement and the proceeding under (the New York statute) interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. . . . In each case the bookseller is put on notice by the complaint that sale of the publication charged with obscenity in the period before trial may subject him to penal consequences. In one case he may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction. The bookseller

> may of course stand his ground and confidently believe that in any judicial proceeding the book could not be condemned as obscene, but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content - the treat of subsequent penalization." Id. 360 U.S. at 442-43, 77 S.Ct. at 1328-29, 1 L.Ed.2d at 1475.

Although we realize that the preliminary injunction in Kingsley is quite different from the injunction being scrutinized in this case, the Court's analysis provides us with some guidance. The judge's order here is restricted to legally obscene matter; in fact, it is limited to only a specified portion of what is legally obscene. Thus, the defendants suffer less indecision as to what materials they can deal in under the injunction than they would under a usual

criminal obscenity statute. It is true that the defendants may be fined or imprisoned if they violate the injunction, but those same consequences could flow from a violation of the criminal law.

In fact, under a Chapter 19 nuisance proceeding, unlike a prosecution under a criminal law, a defendant gets two chances. Before such an injunction issues, a court must find that a defendant sold illegal lewd matter in the past; however, he is not subject to criminal sanctions until he sells obscene matter again in violation of the court's order. See Rendleman, Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute, 44 Chi.L.Rev. 509, 556 (1977).

There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both

proceedings the defendant can always defend on the ground that the material is not legally obscene. See McKinney v. Alabama, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976). The burden is on the State to prove obscenity beyond a reasonable doubt. See G.S. 5A-15(f) (Cum.Supp. 1977). Although a defendant is not entitled to a jury trial in the contempt action, the United States Supreme Court has held that a defendant has no constitutional right to a jury trial in criminal contempt actions if the authorized penalty or the penalty actually imposed does not exceed six months imprisonment. Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974). Under G.S. 19-4, a defendant is subject only to "a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000.00), or by imprisonment in the county jail not less than three or more than six months, or by

both fine and imprisonment." Thus, an injunction such as this one is in effect nothing more than a personalized criminal statute against selling certain obscene material that is directed toward the defendants because they sold illegal matter in the past. As the Legislature could have constitutionally imposed the same restrictions on the public in general, it is not an unconstitutional prior restraint.

Although this point has not been raised by any party to this lawsuit, we note that G.S. 19-4 authorizes a judge to "summarily try and punish the offender", for violation of an injunction issued under Chapter 19. While this "summary" action is not defined by the Legislature, we emphasize that the procedural safeguards outlined above must be followed. See Harris v. United States, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965); Cooke v. United States, 267 U.S.

517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

Although there are provisions for summary criminal contempt proceedings in G.S. 5A-13 and G.S. 5A-14, they apply only to acts of contempt committed near or before a judicial officer which are "likely to interrupt or interfere with matters then before the court." A violation of an order such as this one certainly does not fall within that category. Therefore, the plenary proceedings provided for in G.S. 5A-15 apply to contempt actions following a Chapter 19 injunction.

Defendants strongly assert that this case is controlled by Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 626, 75 L.Ed. 1357 (1931). That case concerned a state statute that authorized abatement of certain nuisances, one of which was "a 'malicious, scandalous and defamatory newspaper.'" The trial court found the newspaper in question

to be a public nuisance, and it permanently enjoined defendants "'from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title.'" The United States Supreme Court struck down the injunction, declaring that it constituted an invalid prior restraint on defendants' first amendment right to freedom of the press. While there are some analogies between Near and this case, we feel that the two are distinguishable in several important respects.

The defendants in Near operated a newspaper that chiefly made allegations of misconduct directed toward public officers. The Court, in dealing with the issue of freedom of the press repeatedly emphasized that "(t)hat liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of

official misconduct." Id. at 717, 51 S.Ct. at 631, 75 L.Ed. at 1368.

The difference between trying to limit that type of expression and obscenity has been recognized. "(I)t is manifest that society's interest in protecting this type of expression (erotic material) is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Young v. American Mini Theatres, 427 U.S. 50 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310, 326 (1976). We agree with Justice Stevens when he said: "It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment." Smith v. United States, 431 U.S. 291, 318 - 19, 97 S.Ct. 1756, 1773, 52 L.Ed.2d 324, 346 -47 (1977) (Stevens, J., dissenting on other grounds). See also

Kingsley Books v. Brown, supra, 354 U.S. at 445, 77 S.Ct. at 1330, 1 L.Ed.2d at 1476.

It is clear from the Near decision itself that the Court did not intend for it to apply to injunctions concerning obscene materials.

> "(T)he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. . . . These limitations are not applicable here." Near v. Minnesota, supra, 283 U.S. at 716, 51 S.Ct.

at 631, 75 L.Ed. at 1367. (Emphasis supplied.)

The Minnesota statute in Near also authorized an injunction against obscene publications declared to be nuisances. However, the Court specifically limited its holding to striking down clause (b) of the act that dealt with malicious and defamatory newspapers. "The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance." Id. at 737, 51 S.Ct. at 638, 75 L.Ed. at 1378 (Butler, J., dissenting).

The Court in Near was also concerned about the lack of specificity in the trial court's injunction, which restrained the defendants from publishing "'any publication whatsoever which is a malicious, scandalous and defamatory" newspaper, as defined by

law.'" The Court noted that "scandalous and defamatory" are broadly defined by law to include publications charging official misconduct. Therefore, if one of the defendants' future editions contained any such allegations, the defendants would then have to prove that the publication is "usual and legitimate," "consistent with the public welfare," and published with "good motives and for justifiable ends" in order not to be held in violation of the order. The Supreme Court recognized that these are vague standards at best.

Our case is different. We have already stated that the burden would be entirely on the State to prove that these defendants had shown or sold illegal lewd matter in violation of the injunction. More importantly, this order is narrowly drawn, and the prohibited conduct is specifically defined.

The defendants assert that the danger

here is in self-censorship; they will limit their sale of constitutionally protected matter for fear that they may violate the injunction. The Supreme Court has addressed this issue.

> "The fact that the First Amendment protects some, though not necessarily all, (erotic) material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater . . . involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (holding that a person can collaterally attack the constitutionality of a criminal law that chills free speech

in the political context)." Young v. American Mini Theatres, supra, 427 U.S. at 61 96 S.Ct. at 2448, 49 L.Ed.2d at 321.

We are sensitive to the importance of defendants' claim that their first amendment right to free speech is being chilled by the injunction against future sales of unnamed matter. However, in light of the unquestionably obscene nature of all defendants' films and magazines before the court below, the fact that the defendants are adequately warned of which materials they cannot sell or exhibit by the specifically drawn order, and the procedural safeguards afforded the defendants, we find that the injunction is not an unconstitutional prior restraint.

As to all issues that are properly before this Court, the trial court is in all respects AFFIRMED.

BRITT and BROCK, JJ., did not participate in this decision.

EXUM, Justice, dissenting:

As the majority opinion notes at the outset, the present case "concerns the statutory construction and constitutionality of Chapter 19 of (the) North Carolina General Statutes." I disagree in part with the majority's handling of both aspects. As to the first, the majority upholds an injunction the breadth of which is not authorized by the statue. As to the second, the procedure upheld here is an unconstitutional prior restraint on the exercise of freedom of speech and the press.

I agree that the "core of the controversy in this case stems from that part of the trial court's order that enjoins the defendants from selling or showing obscene matter that is not listed on the inventory," i.e., matter described in the abstract by

the statutory definition of obscenity that defendant might acquire in the future. The majority assumes, without stating its reasons therefore, that the trial court was authorized by the statute to enter an order this broad. As I read the statute, it authorizes only an injunction against future possession or sale of matter before the court and judicially declared to be obscene at the proceeding in which a defendant is adjudged to be maintaining a nuisance.

Chapter 19, which is entitled "Abatement of Nuisances", is not an easy statute to comprehend. Besides obscenity, it deals with places used for purposes of "assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors (and) illegal possession or sale of narcotic drugs . . . ." G.S. 19-1(a). It is, in other words, a general nuisance abatement statute. One of the key methods of

abatement it seems to contemplate is the closing of the place where the nuisance is maintained. See G.S. 19-2.1, 19-5, 19-6, 19-7. Insofar as these closing provisions might be applied to a place that disseminates printed material or motion pictures, there are, it is conceded, serious constitutional questions. See State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); General Corporation v. Sweeton, 294 Ala. 657, 320 So.2d 668 (1975).

There are, however, other remedies provided under the statute against one maintaining a nuisance. It is one of these other remedies that is involved here. In addition to the abatement of the nuisance by closing, G.S. 19-2.1 provides for a suit "perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter . . ." The

statute's primary remedial provisions are set out in G.S. 19-5, as follows:

"Content of final judgment and order. If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

"Such order may also require the

effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

"The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited." (Emphasis

supplied.)

Under this provision the question whether the injunction here is authorized boils down to what is meant by enjoining the defendant or any other person from "further maintaining the nuisance" and from "maintaining such nuisance elsewhere." This language implies a limitation on the scope of injunctive relief to materials before the court at the time of the determination that a nuisance exists. The acts that can be enjoined are "further maintaining the nuisance" or "maintaining such nuisance elsewhere." The General Assembly has chosen at those two points in this provision to use quite specific language. This language must refer to the particular materials found by the trial court to be "lewd matter" and on which it must have based its determination that a nuisance existed. Thus, a defendant can under the statute be enjoined

from restocking the same materials that have once been judicially determined obscene. The statute does not, however, give the court the power to enjoin a defendant from selling or showing other materials that are not before it.

In addition to avoiding a serious constitutional question see In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); In re Dairy Farms, 289 N.C. 456, 223 S.E.2d 323 (1976), interpreting the statute in this fashion would make it compatible with our criminal obscenity statutes. See G.S. 14-190.1 through 14-190.8. Under those statutes, there is provided "an adversary determination of the question of whether books, magazines, motion pictures, or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials." G.S. 14-190.2(a). Thus under our criminal statutes, no one can be

prosecuted for selling, showing, distributing or disseminating any material until it has first been determined to be obscene. Where the General Assembly has not spoken more clearly, it is reasonable to assume that it intended this related nuisance statute, which carries with it a possibility of contempt punishment, see G.S. 19-4, to follow a similar procedure.

I think the injunction is broader than permitted by the statute and should not be upheld in its entirety. Furthermore the majority's contrary interpretation renders the statute unconstitutional insofar as it permits an injunction against future expression.

The trial judge enjoined defendants from "possessing for exhibition to the public" and "possessing for sale and selling" various kinds of "lewd matter." This "lewd matter" was described generically in

the injunction itself in terms of the statutory prohibition. See G.S. 19-1.1(2). The injunction thus seeks to proscribe categories of expression rather than any particular film or publication which has been specifically and judicially declared violative of the statute. It prohibits the future possession of unnamed films, magazines, books and papers and subjects defendants to possible fines and imprisonment prescribed in G.S. 19-4 if they should violate it by possessing any of these generically described items which might later be judicially determined in a contempt proceeding to fit within its proscription.

Insofar as the statute authorizes this kind of injunction I believe it and, therefore, the injunction itself contravenes the freedom of speech and freedom of the press clauses of the First Amendment as applied to the states under the Fourteenth Amendment.

To me this is the kind of prior restraint against future expression which the United States Supreme Court has consistently and rightly determined to be inconsistent with the guarantees of the First Amendment. The highest courts of at least three other states have found orders virtually identical to the one here to be unconstitutional prior restraints. Parish of Jefferson v. Bayou Landing, Ltd., Inc., 350 So.2d 158, 165-68 (La. 1977); Mitchem v. Schaub, 250 So.2d 883 (Fla. 1971); New Rivieria Arts Theatre v. State, 219 Tenn. 652, 412 S.W.2d 890 (1967). In addition, in a carefully considered opinion, Judge Franklin T. Dupree, Jr., an able jurist noted for his industry and scholarship, has held that insofar as G.S. 19-5 allows an injunction against distribution of materials not previously adjudged obscene, it is unconstitutional. Fehlhaber v. State, 445 F.Supp. 130 (E.D.N.C.

1978). Examination of the revelant constitutional doctrines as applied by the Supreme Court leaves no doubt that these results were correct.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 26, 28, 37 L.Ed.2d 446 (1973), Georgia state prosecutors had filed civil complaints against an Atlanta theater alleging that it was exhibiting two obscene films contrary to a Georgia statute. The complaint prayed that the two films be declared obscene and that the theater be enjoined from exhibiting them. At a non-jury trial, the judge assumed that the films were obscene but ruled that inasmuch as the theater took reasonable precautions against permitting minors to enter and view the films it was constitutionally impermissible to enjoin their further showing. The Georgia Supreme Court reversed. It described the films as "hard core pornography" leaving

"little to the imagination" and held that their further exhibition should have been enjoined. Slaton v. Paris Adult Theater I, 228 Ga. 343, 347, 185 S.E.2d 768, 770 (1971). The United States Supreme Court in a 5-4 decision essentially approved the Georgia civil injunction procedure. It remanded the case, however, for reconsideration by the Georgia Supreme Court in light of the new definitions of obscenity contained in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), decided the same day. In approving the use of injunctive action, however, Chief Justice Burger, writing for the majority, was careful to note, 413 U.S. at 55, 93 S.Ct. at 2634:

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme

Court that the materials were constitutionally unprotected. Thus the standards of Blount v. Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-142, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968); Freedman v. Maryland, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); and Kingsley Books, Inc., v. Brown, supra, 354, U.S. at 443-445, 77 S.Ct. 1325, 1 L.Ed.2d 1469, were met, Cf. United States v. Thirty-Seven Photographs, 402 U.S. 363, 367-369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) opinion of White, J.)."

In Kingsley Books, Inc., v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957), the Court approved a New York procedure "authorizing the chief executive, or legal officer, of a municipality to invoke

a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications." Id. at 437, 77 S.Ct. at 1326. Justice Frankfurter, writing for the majority of five, again, was careful to point out that the procedure under consideration "studiously withholds restraint upon matters not already published and not yet found to be offensive." Id. at 445, 77 S.Ct. at 1330. On this basis he distinguished the procedures then before the Court from those which had been earlier condemned in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

In Near v. Minnesota, the leading case on the constitutionality of injunctions against future expression, the Court had

before it a Minnesota statute which provided in pertinent part as follows:

> "Section 1: Any person who . . . shall be engaged in the business of regularly . . . producing, publishing or circulating, having in possession, selling or giving away.
>
> "(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
>
> "(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,
>
> -is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided."
>
> Id. at 702, 51 S.Ct. at 626.

The statute further authorized the county attorney or any citizen to maintain an action for the injunction authorized by the statute. A proceeding for an injunction was brought

in the Minnesota state courts against Near and other defendants. At trial it was found as a fact that the defendants had published various editions of a periodical known as "The Saturday Press" from 24 September 1927 to 19 November 1927 and that these editions were "'chiefly devoted to malicious, scandalous and defamatory articles.'" It was further found that the defendants "'did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper'" and that such publications constituted a public nuisance. The trial court thereupon enjoined the publication of "The Saturday Press" and perpetually enjoined defendants from publishing "'any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.'" Id. at 706, 51 S.Ct. at 627. The Supreme Court, with Chief Justice

Hughes writing for a majority of five, concluded that the injunction was "the essence of censorship" and constituted the kind of prior restraint on expression that was violative of the freedoms of press and speech guaranteed by the First Amendment and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court said in meeting the arguments of the State of Minnesota:

> "Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes.
>
> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of

> reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication." Id. at 720, 721-22, 51 S.Ct. at 633.

Thus, the Court in Near made it clear that the truth or falsity of the charges contained in the particular periodicals under consideration was immaterial to the constitutional question of whether future publications could be enjoined.

Relying on Near, the Court in Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971), struck down an Illinois state court injunction against "'passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City

of Westchester, Illinois.'" The trial court found that the persons enjoined had, through the distributions of certain pamphlets, accused a real estate broker in Westchester, Illinois, of arousing fears of local white residents that negroes were moving into the area and thereafter exploiting their reactions to bolster his real estate business. The trial court found that the pamphleteers' activities in Westchester had invaded the real estate agent's right of privacy and had caused irreparable harm and that he was without an adequate remedy at law. The Supreme Court in an opinion by Chief Justice Burger struck down the injunction saying:

> "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the

injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." Id. at 418-19, 91 S.Ct. at 1577.

In New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the United States government sought to enjoin the New York Times and the Washington Post from publishing contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" (the Pentagon papers). District courts for the Southern District of New York and the District of Columbia and the

Court of Appeals for the District of Columbia Circuit had refused to issue an injunction against the newspapers. The Court of Appeals for the Second Circuit held, however, that the injunction should issue. The United States Supreme Court in a per curiam opinion concurred in by six justices concluded that the injunction should not issue notwithstanding that in the opinions of the various concurring justices the Pentagon papers, if published, would have "serious impact" on the national security, would "do substantial damage to public interest" and might even constitute a violation of federal criminal law. This case is significant in the area of the permissible limits of restraint on expression in that the very materials sought to be restrained were before the Supreme Court for review. Here, by contrast, the restraint is against materials yet to be seen or even published.

Any restraint against future expression, the Supreme Court has repeatedly said, comes "'bearing a heavy presumption against its constitutional validity.'" Southeatern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975), and cases there cited. The reason is that there often is a finely drawn line between protected speech under the First Amendment and that which is not so prctected. This is particularly true in the area of obscenity. There are, of course, many items which are clearly on one side or the other of that line. Defendants here concede that all items now before the court are obscene. Under the statute they can be seized and destroyed. There is no contest in this case as to them. On the other hand there are many forms of expression upon which reasonable persons differ regarding whether they are obscene, or lewd, within the statutory

definition of those terms. Examples abound in our literature, cinematic and otherwise. [1] One is found in Yeager v. Neal, 26 N.C.App. 741, 217 S.E.2d 576 (1975). That case concerned the film, "Memories Within Miss Aggie" which the state sought to have declared obscene as that term was defined in a criminal statute G.S. 14-190.1 [2] At the

(1) Masturbation, homosexuality and sadism are depicted in a recently released film, "Midnight Express", which has nevertheless been critically acclaimed and could hardly be said to lack serious literary, artistic and educational value. See Newsweek, 16 October 1978, at 76, 81; Time, 16 October 1978, at 111-12; Vogue, September 1978, at 62.

Sodomy per anum was graphically depicted in the critically acclaimed film, "Last Tango in Paris". See Newsweek, 12 February 1973, at 54-58.

The works of Henry Miller, Tropic of Capricorn and Tropic of Cancer, were once widely considered obscene, but are now highly regarded as literary pieces. See Gordon, The Mind and Art of Henry Miller (1967). The same can be said of D. H. Lawrence's Lady Chatterly's Lover. See Sanders, D.H. Lawrence; The World of the Five Major Novels, at 172-205 (1973). See generally Rembar, The End of Obscenity (1968).

(2) The applicable parts of the statute are as follows:

"(b) For purposes of this Article any material is obscene if:

adversary hearing required by G.S. 14-190.2, over which I, as trial judge presided, the film was shown and various witnesses testified about it. All of the witnesses by reason of training and background possessed some expertise in the field of literary criticism. All felt that the film was

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(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of the section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity."

clearly a serious literary and artistic work. There was no testimony to the contrary. Finding on the evidence presented including the film itself that the film did have serious literary and artistic value, I determined that it could not be declared obscene. The Court of Appeals affirmed on the basis of this finding which was not excepted to by the state although according to a vigorous dissent by Brock, C. J., a member of the panel who also viewed it, they all agreed that "the film depicts in a patently offensive way portrayals of actual sexual intercourse, normal and perverted, anal and oral, and a lewd exhibition of uncovered genitals in the context of masturbation." Id. at 745, 217 S.E.2d at 579.

The difficulty of defining obscenity in the abstract has long been anathema to legislatures and courts. Some judges have conceded that efforts to do so must

ultimately fail.[3] Other judges, however,

(3) Miller v. California, supra, 413 U.S. 15, 37, 93 S.Ct. 2607, 37 L.Ed.2d 419 (Douglas J., dissenting); Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 73, 93 S.Ct. 2628, 37 L.Ed.2d 446 (Brennan, J., dissenting); see also Smith v. United States, 431, U.S. 291, 311, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977) (Stevens, J., dissenting in a federal criminal obscenity prosecution, sustained by the majority, on the ground that "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." Id. at 316, 97 S.Ct. at 1772). The majority opinion, I fear, does not fully represent Justice Stevens' position in this area. He said, id. at 318-21, 97 S.Ct. at 1773:

> "It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.
>
> "I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct.

(This footnote is continued on the next page)

assert that they know obscenity when they see it. [4] If this is so, then a corollary must be that judges cannot know it until they see it. Even if obscenity can be defined in the abstract, it cannot be so enjoined in keeping with the First Amendment. To be dealt with judicially it must first

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> Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." (Emphases supplied.)

(4) "I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring.)

be judicially seen.

Thus the Supreme Court has consistently insisted that states in their efforts to regulate prohibited forms of expression adopt procedures which are sensitive to the constitutional mandate that protected expression be in no wise threatened:

> "(T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . . Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 2 L.Ed.2d 1460, 1472. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for

constitutionally protected speech." Marcus v. Property Search Warrant, 367 U.S. 717, 731, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961); accord, Southeastern Promotions Ltd., v. Conrad, supra, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448.

The majority relies on the proposition that an injunction against future expression which, by definition, will be violative of the law is no greater threat to protected speech than a statute which imposes criminal sanctions against one who engages in such expression. Since the United State Supreme Court has approved such criminal sanctions against obscenity, the majority contends, it ought to approve these kinds of injunctions. This argument is an old one. It was made and had to be faced in Near v. Minnesota. There the Supreme Court, recognizing that libel could be punished criminally, nevertheless struck down a civil injunction

against it. The Court there said, 283 U.S. at 713-14, 51 S.Ct. at 630:

> "The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal he must take the consequence of his own temerity.' 4 Bl.Com. 151, 152; See Story on the Constitution, §§1884, 1889."

The Supreme Court rejected the argument then and has consistently rejected it since. The

Court said in Southeastern Promotions, Ltd., v. Conrad, supra, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448:

> "The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law; a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others before hand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

The reason for this distinction is thus that in a free society restraints on expression

not yet uttered are totally antithetical to any notion of free speech largely because of the then uncertainty of what might be said. Once the expression is made it is an accomplished fact upon which it is permissible for courts to act as in other criminal cases. If the expression be illegal those responsible can be held accountable. This notion inheres elsewhere in the law in the familiar doctrine of admittedly uneven application that equity will not enjoin a proposed criminal act on the ground that there is a complete remedy at law if the act is committed. See Mills v. Cemetery Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955); Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

Another distinction is that in a criminal action various procedural safeguards are present, for example, entitlement to a jury trial. Alleged violations of the kind

of injunction issued in this case may be tried and punished by the presiding judge.[5]

Futhermore it is well to note again that in North Carolina one may not be criminally prosecuted for dealing in obscene materials unless he deals in material which has first been judicially declared to be obscene in an adversary hearing conducted prior to the criminal prosecution. G.S. 14-190.2. There seems to be no constitutional requirement for such an adversary proceeding prior to criminal prosecution, Miller v. California, supra, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, but our General

(5) G.S. 19-4 provides:

"Violation of injunction; punishment - In case of the violation of any injunction granted under the provisions of this Chapter, the court or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000.00) or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment."

Assembly has deemed it appropriate to provide such protection.

The construction which I feel should be given this legislation does not render the state powerless to deal with the problem of obscenity. The legislature could, if it thinks such action necessary, amend its criminal statutes, G.S. 14-190.1, et seq., so as to eliminate the requirement of an adversary hearing prior to criminal prosecution or provide penalties for the violation thereof which would serve to deter violators. Even under the civil nuisance proceeding as I would interpret it, the remedies against dissemination of obscene material are formidable. Once such materials are located an ex parte judicial order may issue forthwith placing substantial limitations on trafficking in the material. G.S. 19-2.3. If, thereafter, the material is judicially determined or admitted to be obscene it can

be confiscated and destroyed. G.S. 19-5. All monies paid in consideration for the sale of obscene material after the ex parte order has issued must be accounted for, and if these monies are thereafter determined to have been paid in consideration of obscene material they may be forfeited to the local government. G.S. 19-6. Even if a defendant, determined to violate these statutes, replenishes his stock with items different from those previously confiscated under prior orders, it would seem that only a few successive confiscations of his stock in a compaign of zealous law enforcement would render his unsavory business so unprofitable that he would have to quit.

For the reasons stated I vote to vacate so much of the trial court's order as seeks to enjoin defendants from dealing in items not yet published or possessed by them.

Appendix D

(Reference: Amicus Curiae Brief at pg. 7, 20)

Opinion of the North Carolina Supreme Court in Chateau X, et al. v. State of North Carolina ex rel. Andrews, 302 N.C. ___, ___ S.E.2d ___ (Mar. 4, 1981) after remand from the United States Supreme Court for reconsideration in light of Vance et al. v. Universal Amusement Co., Inc., 445 U.S. 308.

..... D-1 thru D-28

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1981

CHATEAU X, INC., a South Carolina Corporation; ATLA THEATERS, INC., a South Carolina Corporation; JAMES RUSS, individually and in his capacity as an officer of both Chateau X, Inc., and ATLA Theaters, Inc.; ALBERT PELOQUIN, individually and in his capacity as an officer of both Chateau X, Inc. and ATLA Theaters, Inc.; HECTOR RIQUELME, JR.; FREDERICK OLLIE BYROM; SUSAN RUPE; VICTOR STROOP; JIMMIE TUCKER HILL; DENISE TERRY LAMB; GEORGE JOHNSON; JOE HORNSBY; ROBERT JEROME SMITH; and a place of buisness known as Chateau X, Theater and Book-store, Highway 17 South, Jacksonville, North Carolina	No. 83 -Onslow No. 83-Onslow (On remand from the United States Supreme Court) Filed: March 4, 1981.
v.	
STATE OF NORTH CAROLINA, ex rel. WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH DISTRICT OF NORTH CAROLINA	

On remand from the United States Supreme Court for consideration of this Court's prior

decision, State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E. 2d 603 (1979), in light of Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L. Ed. 2d 413 (1980) (per curiam).

This case was argued as No. 23, Fall Term 1980.

Attorney General Rufus L. Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., Assistant Attorney General Marvin Schiller and I. Beverly Lake, Jr., for the State.

Bailey, Raynor & Erwin, by Frank W. Erwin, and Arthur M. Schwartz, P.C., for defendants.

CARLTON, Justice.

I.

This action was instituted on 12 December 1977 by the State, through William H. Andrews, District Attorney for the Fourth District, to declare the Chateau X, Theater

and Bookstore a nuisance under Chapter 19 of the North Carolina General Statutes and to permanently enjoin defendents, South Carolina corporations doing business in Jacksonville, North Carolina, and its officers and employees from "maintaining, using, continuing, owning or leasing said place known as Chateau X Theater and Bookstore and any place in the state of North Carolina as a nuisance." The complaint alleged that defendants maintained the Theater for the purpose of illegal exhibitions and sales to the public of obscene and lewd films and publications as a regular and predominant course of business.

The trial was conducted on 4 January 1978 before Judge Small, who, by stipulation of the parties, sat without a jury. Although nineteen exhibits of films and magazines possessed for sale or shown by Chateau X were introduced into evidence, the trial judge viewed only two of them, State's Exhibit

Number 15, a film entitled "Airline Cockpit", and State's Exhibit Number 3, a magazine called "Spread Your Legs." The parties mutually stipulated that all films and magazines listed in State's Exhibit Number 20, an inventory of materials found at Chateau X on 12 December 1977, "contain substantially similar material" as was contained in State's Exhibits Numbers 15 and 3. Defendants presented no evidence. It was stipulated, however, that had defendants testified, "the evidence would indicate that the motion pictures exhibited and the books distributed and sold were done (sic) to consenting adults. . . ."

The trial judge found that State's Exhibits Numbers 15 and 3 were obscene and, pursuant to the parties' stipulation, that the remainder of the nineteen films and magazines and all materials listed on the inventory were obscene. He found all the

films and magazines to be nuisances and declared Chateau X to be a nuisance under Chapter 19 of our General Statutes and ordered that all materials listed on the inventory be confiscated and destroyed.[1] Defendants were enjoined from exhibiting or selling any item listed on the inventory, from possession for exhibition to the public any other film in the future which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific values and depicts:

(1) Persons engaging in sodomy, per os, or per anum,

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation,

(1) This portion of the trial court's judgment requiring confiscation and destruction of the obscene material was stayed pending appeal, and the defendants, their officers, agents and employees were enjoined from removing or destroying the material by order of Judge Small dated 13 January 1978.

and from possessing for sale and selling lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without the same values and which depict any of the three specific acts of sexual conduct listed above.

Both defendants and the State appealed from the trial court's judgment. On 8 May 1978 this Court granted the request of all parties, pursuant to G.S. 7A-31(b), to hear the case prior to its determination by the Court of Appeals. We affirmed the judgment of the trial court concluding, inter alia, that Chapter 19 of the General Statutes places the burden of proving obscenity on the State and that portion of the trial judge's order enjoining the sale or exhibition of obscene matter which has not been

judicially determined to be obscene, if it is a prior restraint, is a constitutionally permissible one because it is, in reality, nothing more than a personalized criminal statute.

Defendants sought further review of this case and on 25 April 1980 the United States Supreme Court granted their petition for a writ of certiorari, vacated our prior decision and remanded the cause to this Court "for further consideration in light of Vance." Chateau X, Inc. v. Andrews, 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed.2d 782 (1980).

II.

Our consideration of this cause on remand is limited to determining (1) whether the holdings of Vance v. Universal Amusement Co. are applicable to the case sub judice, and (2) if so, whether the principles enunciated in Vance require reversal or

modification of our previous decision. We hold that Vance is inapplicable to the present case and, accordingly, reaffirm our previous decision by incorporating herein by reference the original opinion of this Court, reported at 296 N.C. 251, 250 S.E. 2d 603.

In Vance, the United States Supreme Court was confronted with the question of the constitutionality of a Texas public nuisance statute [2] which inter alia,

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(2) The Texas statute provides:

Art. 4667. 4685-93 Injunctions to abate public nuisances

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

authorizes state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been judicially determined to be obscene. The Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit and held that the Texas statute in question was unconstitutional. The Court of Appeals read the statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt

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(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

Tex. Rev. Civ. Stat. Ann. art. 4667 (Vernon Supp. 1980) (emphasis added).

review of a preliminary finding of probable obscenity. Universal Amusement Co. v. Vance, 587 F. 2d 159 (5th Cir. 1978). In holding the Texas statute unconstitutional the Supreme Court emphasized:

> that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and . . . that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.

445 U.S. at 315-16, 100 S. Ct. at 1160-61, 63 L. Ed. 2d at 420.

In Vance, appellee, an operator of an adult motion picture theater, brought a suit in federal district court for declaratory

relief and an injunction seeking, in part, [3] to declare the Texas nuisance statute, [4] unconstitutional and to enjoin any action by the County Attorney under that statute. The district court concluded that the statute, when coupled with the Texas Rules of Civil Procedure governing injunctions, operated as an invalid prior restraint on the exercise of first amendment right and held the statute to be unconstitutional.

The State of Texas appealed to the United States Court of Appeals for the Fifth

(3) The suit also challenged the constitutionality of another Texas nuisance statute, Tex. Rev. Civ. Stat. Ann. art. 4666 (Vernon 1952). The district court found that statute to be unconstitutional as applied to obscenity, but the Court of Appeals for the Fifth Circuit reversed that holding and found that this statute was inapplicable. Universal Amusement Co. v. Vance, 587 F. 2d 159, 166-67 (5th Cir. 1978). Appellees did not appeal from that portion of the Court's decision, and the constitutionality of Art. 4666 was not before the United States Supreme Court. 445 U.S. at 31[illegible] n. 1, 100 S.Ct. at 1158 n. 1, 63 L. Ed. 2d at 416 n.1.

(4) Tex. Rev. Civ. Stat. Ann. art. 4667, supra note 2.

Circuit, and a divided panel of that court reversed, concluding that "(b)ecause the injunction follows rather than precedes a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because (the injunction's) prohibitions can apply only to further dealings with obscene and unprotected material," the injunction did not constitute a prior restraint. Universal Amusement Co. v. Vance, 559 F. 2d 1286, 1292 (5th Cir. 1977) (panel decision). The panel also concluded that the injunction procedure satisfied the procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L. Ed. 2d 649 (1965),[5]

(5) The procedural safeguards enunciated by Freedman applicable to regulation of communicative activity are:

(1) The burden of proving that the material is beyond the purview of first amendment protection must rest on the censor or the party who is seeking to have the material banned.

(2) There must be a judicial determination as to whether the material constitutes protected

because any temporary restraint entered pending final adjudication on the merits would be imposed by a judge instead of an adminstrative censor. Universal Amusement Co. v. Vance, 559 F. 2d at 1292-93. The judgment of the district court was reversed.

The Court of Appeals granted rehearing en banc, reversed the decision of the panel and held that Art. 4667(a) is unconstitutional. Universal Amusement Co. v. Vance, 587 F. 2d 159. The eight-member majority found the statute unconstitutionally objectionable in several respects: First, the Texas statute authorizes injunctions against the future exhibition of unnamed films and, thus, amounts to an impermissible prior restraint on materials not yet declared obscene. Second, under Texas procedure, an

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expression.

(3) There must be a procedural guarantee of a prompt final judicial decision.

380 U.S. at 58-59, 85 S. Ct. at 738-39, 13 L. Ed. 2d at 654-55.

obscenity case is treated no differently from any other civil case and there is no provision for a prompt review on the merits. The six-member dissent concluded that, as a practical matter, the injunction authorized by the Texas statute imposed no greater a prior restraint than a criminal obscenity statute and, thus, the statute must be constitutional.

On appeal, the Supreme Court limited its review to two questions: (1) whether an "obscenity injunction" under the Texas statute imposes no greater a prior restraint than any criminal statute, and (2) whether the fifth circuit erroneously held that no prior restraint of possible first amendment materials is constitutionally permissible.

With respect to the first issue, the Supreme Court concluded that the Texas statute did impose a greater, more onerous and more objectionable prior restraint than does

a criminal statute because:

> (p)resumably, an exhibitor would be required to obey (the injunction) pending a review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal proceeding.

445 U.S. at 316, 100 S. Ct. at 1161, 63 L. Ed. 2d at 421. Justices White and Rehnquist, in dissent, disagreed with the majority's conclusion, arguing that because any injunction granted under the Texas statute would be phrased in terms of the Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), [6] definition of obscenity,

(6) In Miller, the Supreme Court formulated a new
(This footnote is continued on the next page)

an exhibitor could never be found in contempt for showing a nonobscene film. In response, the majority seemed to imply that, while this point is true with regard to unnamed obscene films, the Texas statute also allowed the entry of a temporary injunction prohibiting the exhibition of specific named films on the basis of a showing of probable success on the merits. Apparently, it was with regard to the named films that the majority found the Texas statute constitutionally infirm: "Even if it were ultimately determined that the (specifically named) film is not obscene,

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legal standard for obscenity, holding that the basic guidelines for the trier of fact are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S. Ct. at 2615, 37 L. Ed. 2d at 431 (citations omitted).

the exhibitor could be punished for contempt of court for showing the film before the obscenity issue was finally resolved." 445 U.S. at 312 n. 4, 100 S. Ct. at 1159 n.4, 63 L. Ed. 2d at 418 n. 4.[7]

With regard to the second issue, the Supreme Court disagreed with appellant's contention that the Court of Appeals had held that there can never be a valid prior restraint on communicative activity. Instead, that Court viewed the lower court's opinion as holding only that the Texas statute, in combination with the state's procedural rules, was procedurally deficient and that it authorized prior restraints that are more onerous than is constitutionally

(7) The brief treatment of this issue in the per curiam opinion renders our task of determining the precise holding quite difficult. We proceed on what we believe is the most logical basis for the Supreme Court's conclusion that the Texas statute authorizes prior restraints more onerous and more objectionable than the threat of criminal sanctions, that stated above in the text.

permissible. Consequently, the Supreme Court did not reach the issue of whether there can ever exist a constitutionally permissible prior restraint of possible first amendment materials.

III.

We now turn to a consideration of the North Carolina moral nuisance statutes in light of the Vance decision. As we read the pertinent portion of the Vance opinion, the Supreme Court held that the Texas statute, which admittedly authorized prior restraints of indefinite duration on the exhibition of materials that had not been finally adjudicated to be obscene, was unconstitutional because it authorized prior restraints more onerous and more objectionable than corresponding criminal sanctions. The vice of the Texas statute lay in the possibility that an exhibitor could be held in contempt for violating a temporary

injunction by showing a film prior to a final judicial determination of obscenity even if the film were ultimately found to be nonobscene. As stated above, the United States Supreme Court has interpreted the Texas statute to allow a preliminary injunction against unnamed materials only if those materials come within the legal definition of obscenity and also to allow the injunction to issue against named materials. As to the former, presumably, obscenity would be an essential element required to be proved before the seller or exhibitor could be held in contempt; thus, as to the unnamed materials, nonobscenity would be a defense in a contempt proceeding and the injunction procedure is no more onerous than and, in practical terms, resembles a criminal sanction imposed after the fact of sale or exhibition. As to the named materials however, the United States Supreme Court

concluded that contempt could be predicated merely upon the showing of these materials in violation of the express terms of the injunction, without regard to the character or content of the materials; thus, as the named materials, mere exhibition or sale would constitute the violation without regard to the obscenity or nonobscenity of the subject matter. Nonobscenity would not be a defense to a contempt charge for showing or selling a material specifically named in the injunction. In this respect, the Supreme Court concluded, the Texas injunction procedure is more onerous than a criminal sanction and constitutes a constitutionally impermissible prior restraint.

In contrast to the statute construed in Vance, the moral nuisance proceedings authorized by Chapter 19 of our General Statutes permit no such vice. As we made clear in our prior decision in this case,

nonobscenity is always a defense to a contempt proceeding and in such an action the State has the burden of proving obscenity beyond a reasonable doubt:

> There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always defend on the ground that the material is not legally obscene. The burden is on the State to prove obscenity beyond a reasonable doubt.

State ex rel. Andrews v. Chateau X, Inc., 296 N.C. at 264, 250 S.E.2d at 611 (citations omitted.)

The constitutional challenge made on the initial appeal by the original defendants to the Chapter 19 proceeding was directed toward the constitutionality of a permanent injunction, one entered after

a final judicial determination of obscenity. Although the above-quoted language was directed toward the permanent injunction, which can enjoin specifically named materials only after they have been found to be obscene, see id. at 255-56, 250 S.E. 2d at 606, and the issue presented in Vance concerning a temporary injunction was not under consideration, we deem this rule to be equally applicable in contempt actions brought for violation of a temporary injunction. Under our laws, therefore, no penalty, whether it be a fine or imprisonment,[8] can be imposed upon a defendant unless and until it has been judicially determined that he has sold or exhibited obscene matter. Because of this special procedural safeguard,

(8) Violation of any injunction granted under the provisions of Chapter 19 constitutes contempt and is punishable by imposition of a fine of not less than $200.00 or more than $1,000.00 or by imprisonment in the county jail for not less than three or more than six months, or by both fine and imprisonment. G.S. §19-4 (1978).

the "prior restraint" imposed by our statutes, if any, is neither more onerous nor more objectionable than a criminal sanction meted out after the fact of sale or exhibition and, therefore, is constitutionally permissible.

Under our law, sellers and exhibitors of erotic material can be punished only for dealing in materials which are legally obscene and unprotected by the first amendment guarantee of freedom of speech. Since non-obscenity is always a complete defense to contempt actions, there is no possibility that anyone could be punished for dealing in constitutionally protected materials. Hence, our laws do not share the constitutional infirmities of Texas law, and the principles enunciated in Vance do not control the disposition of the case sub judice. We find nothing in Vance which requires us to depart in any way from our prior decision.

Therefore, the prior decision of this Court, reported at 296 N.C. 251, 250 S.E. 2d 603, is hereby reaffirmed and incorporated by reference as part of the opinion of this Court on remand.

IV.

Because we readopt the prior decision of this Court, the action of the trial court in all respects is, again,

Affirmed.

Justice Meyer took no part in the consideration or decision of this case.

No. 83 - Chateau X v. State Spring Term 1981

Justice Exum dissenting:

I dissent for the reasons given in my dissent to the Court's first opinion, 296 N.C. 251, 268, 250 S.E. 2d 603, 613 (1978), a position which I believe has been bolstered by Vance v. Universal Amusement Co., 445 U.S. 308 (1980), and Spokane Arcades, Inc.

v. Brockett, ___ F. 2d ___, No. 78-2369, slip op. (9th Cir. 1980). Both Vance and Spokane Arcades struck down state statutes which permitted injunctions against future "obscene" expressions. As construed by the majority in this Court's first opinion, a construction with which I then disagreed, our statute under attack permits precisely this kind of injunction.

The argument of the majority initially and in its second opinion is the same: An injunction against future "obscene" expressions has no greater chilling effect on protected expressions than criminal sanctions against "obscene" expressions which have been approved by the United States Supreme Court. As I noted in my original dissent, I thought that Court answered such an argument in Near v. Minnesota, 283 U.S. 697 (1931). If not, it clearly answered it in Vance when it said, 445 U.S. 315-16, "the

burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."

The majority relies on finely spun distinctions between the injunction dealt with in Vance and the one here being considered. Perhaps these distinctions are sufficient to make a difference. I do not think so, because I read Vance more broadly than the majority chooses to.

Vance says that injunctions against future expressions are intrinsically different from criminal sanctions against past expressions. One reason given in Vance is that non-obscenity might not be a defense against a contempt proceeding for violation of a civil injunction. In other words, a defendant may engage in expression that violates the terms of the injunction but

which is not in fact obscene. The dissenters in Vance noted, "(t)his conclusion is plainly wrong." 445 U.S. at 322. The majority here says that non-obscenity is always a defense against a contempt proceeding under our civil injunction statute because the injunction can apply only to materials which, by definition, are obscene.

Even if the dissenters in Vance and the majority here are correct on this point, this is not the only reason why injunctions against future expression are more onerous in light of the First Amendment than criminal sanctions against past expressions. First, as I noted in my original dissent a criminal defendant is entitled to various procedural protections, e.g., a jury trial, not available to an alleged civil contemner. Second, the state in a criminal obscenity prosecution is constitutionally required to prove not only that the particular material in question

is obscene but that defendant knew of its obscenity at the time he dealt with it. Ginsberg v. New York, 390 U.S. 629 (1968); Smith v. California, 361 U.S. 147 (1959). "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity". Mishkin v. New York, 383 U.S. 502 511 (1966). No such proof of scienter, or mens rea, would be required in a civil contempt proceeding. The state as plaintiff would be required to prove only that defendant willfully engaged in expressions prohibited by the injunction.

Appendix E

(Reference: Amicus Curiae Brief at pg. 9
pg. 18, fn. 8)

Idaho District Court's Memorandum Decision and Order, filed July 15, 1977, in Idaho ex rel. Kidwell et al. v. U.S. Marketing Inc., et al., Civil No. 60847 and Idaho ex rel. Kidwell et al. v. Niks Adult Bookstore et al., Civil No. 60875.

..... E-1 thru E-13

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * *

STATE OF IDAHO ex rel. WAYNE L. KIDWELL, Attorney General, and DAVID H. LEROY, Ada County Prosecutor, Plaintiff, vs. U.S. MARKETING, INC., an Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1, County of Ada, State of Idaho, LAMAR LARSEN, manager and property incorporator, JEAN LARSEN, manager, DAN COSSETTE, TOM SHAW, owner and incorporator DAVID BURTON, clerk, JERRY VAN CAMP, JOHN M. SOUTHWORTH, individually, and SOUTHWORTH DISCOUNT STATIONERS, INC., contract property owners, JOHN DOE #1, arcade machine owners or lessors, JOHN DOE #2, security interest holder, JOHN DOE #3-10, and NIKS & NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd., Garden City, County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres Subdivision #1, ROBERT S. LOYA, Owner, JOSEPH E. OSCO, BETTY OSCO, Owner-managers, MELVIN WINN,	CASE NO's. 60874 & 60875 MEMORANDUM DECISION and ORDER FILED July 15, 1977

Clerk, CECIL ANDREW JOHNSON, JR. and HELEN M. HANSON, Property Owners, JOHN DOE #1 arcade machine, owners or lessors, JOHN DOE #2, security interest holder, JOHN DOE #3-10,

Defendants.

APPEARANCES:

For the Plaintiff — OFFICE OF THE ATTORNEY GENERAL
By: Arthur J. Berry
Gordon S. Nielson

For the Defendants — TWAY & TWAY
By: William J. Tway

GREEN & CANTRILL
By: David W. Cantrill

CALVIN DWORSHAK

* * *

The plaintiffs' original complaints were filed in this court on May 16, 1977. The prayers of the two complaints prayed for relief against the defendants in the two cases as follows:

1. For a temporary injunction under the provisions of Sec. 52-403 I.C. to restrain the business operations of the

defendants in the conduct of the respective adult book stores;

2. For an order of the court declaring all publications brought before the court to be a moral nuisance, and abated;

3. That defendants be permanently enjoined and restrained from possessing, advertising, exhibiting or offering for sale, or giving away, the publications, that the publications and films be forfeited to the state as contraband;

4. That there be an accounting of the gross receipts derived from the operation and the application of any funds from the business to the benefit of the owners of the premises;

5. For costs involved in the prosecution of these proceedings;

6. Plaintiffs also sought the issuance of an immediate restraining order restraining defendants from removing the contents of the

business, allowing the state to take an inventory and accounting of the business transactions pending the litigation.

The restraining orders were issued. The two cases were ordered consolidated.

Prior to the time set for hearing on the injunctions to restrain the business operations of the defendants, defendants filed several motions, including a motion to dismiss the entire complaint, on behalf of the defendants engaged in the operation of the respective businesses. The basis of the motion to dismiss is the alleged unconstitutionality of the nuisance-abatement statutes under which plaintiffs have brought these two actions.

In regards to the allegations of unconstitutionality, these defendants allege as follows:

1. Generally, constitutional violations of the statutes as violating Section

1, 5 and 14 of the United States Constitution.

2. Specifically: A. The use of equitable proceedings to regulate free speech is violative to the First Amendment to the United States Constitution. B. The proceedings constitute a prior restraint on free speech also violative of the First Amendment of the United States Constitution. C. Due process of law has been denied defendants under the Fifth and Fourteenth Amendments of the United States Constitution.

Without commenting upon every facet of defendants contentions, suffice it to say the constitutional arguments can be divided into two categories under the Idaho Nuisance-Abatement statutes as they now exist. These two categories are first, proceedings to abate the personal property involved, that is, the publications and films displayed or sold by the defendants in the

operation of the businesses and second, the equitable proceedings to abate the establishment or business itself, including the real property and improvements thereon utilized in the conduct of the business of purveying the items of personal property. The effect of this opinion will be to hold constitutional the nuisance-abatement proceedings against the items of personal property held for sale or exhibition and to hold unconstitutional the nuisance-abatement statutory provisions as they affect the padlocking of the premises and the forfeiture of any rights in and to the use of the real property.

I

ACTION AGAINST THE ALLEGED OBSCENE MATERIAL

First, obscene matter is beyond the protection of the First Amendment to the United States Constitution. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.

2nd 419; Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2nd 1498.

Second, nuisance-abatement proceedings, including those afforded by the Idaho statutes, are proper procedural methods to be used for the abatement of obscene matter. People, ex rel. Busch v. Projection Room Theatre (Cal. S.Ct., 1976), 130 Cal.Rptr. 328, 550 P2nd 600. The statutory process of abatement is not violative of the respective due process constitutional provisions as alleged by defendants. To comment briefly on some of the specific allegations, the state still has the burden of proof and the burden of "satisfaction of the court" is probably the same as proof by a "preponderance of the evidence." Although no jury trial is provided to determine the status of obscenity under the "community standards" provisions, the court can ask for and call an advisory jury to make this determination.

II

THE ABATEMENT ACTION AGAINST THE CONDUCT OF THE BUSINESS AND AGAINST THE REAL PROPERTY

The closing of a business ". . .in which lewd publications constitute a principal part of the stock in trade;" constitutes an unconstitutional restraint on free speech under the First Amendment of the United States Constitution. People ex rel. Busch v. Projection Room Theatre, SUPRA. Additionally, forfeiture of the use of the real property in which the businesses conducted constitutes a depravation of due process of law under the Fourteenth Amendment of the United States Constitution.

In this regard, the language of the Busch case is most instructive and I quote from page 610 of the Pacific Report:

> "We are aware of no reported cases authorizing the closing of a book store or theatre, even after it has been

repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedence, have presented nothing to countermand or distinguish the authorities referred to above, and that oral arguments states they could find no authority justifying the closing of book stores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films to be obscene, after a full adversary hearing, may enjoin the exhibition or the sale thereof by those responsible, we emphasize that the closing of such book stores or theatres, either temporarily or permanently, or the enjoining of the

exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, counstitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution."

In opposition to this concept, the state relies on the Ohio precedents, namely the cases of State ex rel. Ewing v. "Without A Stitch", (Ohio S.Ct. 1974), 307 N.E. 2nd 911 which case was appealed to the Supreme Court of the United States under the name and style of Art Theatre Guild, Inc., et al. v. Ewing, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2nd 82 (1975). The United States Supreme Court opinion, SUPRA, was a memorandum decision in which the court declined to hear the case for lack of a substantial federal question.

This court is of the opinion the Ewing

case should not be used as a substantial, or even guideline, authority for holding constitutional the use of nuisance-abatement statutes to shut down book stores or movie projection theatres temporarily or permanently as opposed to the prior restraint and lack of due process arguments. Nor do I feel the action of the United States Supreme Court in refusing to hear the case has a sufficient basis for a holding to the effect the United States Supreme Court has approved, from the constitutional standpoint, the use of the nuisance-abatement proceedings in this regard. I further appreciate the fact in the Busch case the court was dealing with statutes which did not provide a so-called "saving clause" which would allow owners of the real property to be relieved from the rather harsh application of the closing decrees, and a forfeiture of their property rights.

However, I am further of the opinion the saving clause provision of the Idaho Nuisance Act, Secs. 52-406 and 52-407 I.C. do not supply such reasonable safeguards for innocent owners of real property which will stand the due process attacks of unconstitutionality.

III

FURTHER PROCEEDINGS

The defendants motion to dismiss will be denied since plaintiffs have stated a cause of action against the obscene materials. Further proceedings will be held on this subject matter in accordance with the allegations of the complaint. However, the finding will be made of unconstitutionality, as heretofore expressed, of the proceedings as against the continuation of the business and the claims for relief against the real property and improvements thereon.

This court will not attempt to specify the particular statutory provisions which should be sustained or stricken on the basis of the constitutional arguments. The proceedings at present remain at the pleading and preliminary hearing stage. Since the motion to dismiss is denied the specific statutory determinations will have to be made by the court at the time of hearing, or further proceedings.

The motion to dismiss will be denied.

IT IS SO ORDERED.

Dated this 15th day of July, 1977.

_____

Alfred C. Hagan

Appendix F

(Reference: Amicus Curiae Brief at pg. 9
pg. 18, fn. 8)

Idaho District Court's Memorandum Opinion and Findings of Fact and Conclusions of Law, filed Jan. 16, 1978 in Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc., et al., Civil No. 60874 and Idaho ex rel. Kidwell et al. v. Niks Adult Bookstore et al., Civil No. 60875.

..... F-1 thru F-103

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, ex rel. WAYNE L. KIDWELL, Attorney General, and David H. LEROY, Ada County Prosecuting Attorney, Plaintiff, vs. U.S. MARKETING, INC., and Idaho corporation, 4094 Chinden Blvd., County of Ada, State of Idaho, Lot 34, Block 6, Fairview Acres Subdivision #1, County of Ada, State of Idaho, LAMAR LARSEN, manager and property incorporator, JEAN LARSON, manager, DAN COSSETTE, TOM SHAW, owner and incorporator, DAVID BURTON, clerk, JERRY VAN CAMP, JOHN M. SOUTHWORTH, individually, and SOUTHWORTH DISCOUNT STATIONERS, INC. control property owners, JOHN DOE #1, Arcade Machine owners or lessors, JOHN DOE #2, security interest holder, JOHN DOE #3-10, Defendants,	CIVIL NO. 60874 MEMORANDUM OPINION and FINDINGS OF CONCLUSIONS OF LAW
STATE OF IDAHO, ex rel. WAYNE L. KIDWELL, Attorney General, and DAVID H. LEROY, Ada County Prosecuting Attorney, Plaintiff, vs. NIKS AND NAKS ADULT BOOKSTORE, a business, 3988 Chinden Blvd.,	CIVIL NO. 60875 MEMORANDUM DECISION and

Garden City County of Ada, State of Idaho, Lot 34, Block 7, Fairview Acres Subdivision #1, ROBERT S. LOYA, Owner, JOSEPH E. OSCO, BETTY OSCO, Owner-Managers MELVIN WINN, Clerk, CECIL ANDREW JOHNSON, Jr. and HELEN M. HANSON, property Owners or lessors, JOHN DOE #2, security interest holder, JOHN DOE #3-10, Defendants,	FINDINGS OF FACT and CONCLUSIONS OF LAW Filed: January 16, 1978

Appearing for State of Idaho	Gordon S. Nielson Sr. Deputy Attorney General Statehouse Boise, Idaho 83720 Arthur J. Berry Assistant Attorney General Statehouse Boise, Idaho, 83720
Appearing for U.S. Marketing, et al.	William J. Tway Tway and Tway 609 Main Street Boise, Idaho 83702
Appearing for Niks and Naks, et al.	David W. Cantrill Green and Cantrill P.O. Box 2597 Boise, Idaho 83702

These cases were brought before the Court under the Idaho Moral Nuisance Law, Idaho Code 52-101 et seq. to abate nuisances

allegedly extant by the operation of so called "adult book stores" by the defendants. This action was originally brought against the operators of the stores and those owning an interest in the involved real property as well. Those having an interest in the real property were eliminated from the actions as a result of a ruling on their Motions for Summary Judgment which was decided by Alfred C. Hagan, then one of the judges of this court, by his Memorandum Decision and Order filed herein on July 15, 1977.

In that memorandum, Judge Hagan held that some of the statutes under which the action was brought were unconstitutional insofar as the state sought to close down business operations on the premises in question. His decision further precluded the forfeiture of the real estate. Accordingly, Judge Hagan's decision removed

certain parties from the case. Judge Hagan's decision left open for further trial the questions of whether certain materials shown and sold on the premises in question were obscene.

Other motions timely filed and considered removed other parties from these cases for various reasons. The names of the parties thus removed from these cases are as follows:

From Case No. 60874 State v. U.S. Marketing, et al:

Southworth Discount Stationer's, Inc.

Opal May Gabriel

Jerry Van Camp

John M. Southworth

Subsequently, in Case No. 60874, State v. U.S. Marketing, an amended complaint was filed naming again all of the defendants listed in the title to the case. However, only the following defendants can be

regarded as remaining in the case and this is by virtue of their answer to amended complaint filed herein on September 8, 1977:

U.S. Marketing, Inc.

Lamar Larsen

Jean Larsen

Don Cassette

Tom Shaw

It appears that David Burton was not served with the amended complaint and no counsel has appeared in his behalf.

As to file No. 60875, State of Idaho vs. Niks and Naks Adult Bookstore, the following parties were removed from the case on motion for summary judgment:

Cecil Andrew Johnson, Jr.

Helen M. Hanson

By answer filed in Case No. 60875, the following persons remained in the case:

Robert S. Loya

Melvin Winn

Joseph E. Osco

Betty Osco

The trial to determine whether certain materials acquired by the state were obscene proceeded, starting on December 2, 1977. However, evidence admitted at the trial disclosed only the following entities or individuals to be involved:

As to Case No. 60874:

U.S. Marketing, Inc.

Dan Cossette

Tom Shaw

LaMar Larson

David Burton

As to Case No. 60875:

Joe Osco

Robert Loya

Melvin Winn

As to other parties named in the complaint, there was no evidence of any involvement

in the operation of either bookstore. Accordingly, the action against named parties in the complaint other than those immediately listed above in each case should be dismissed. Those parties immediately listed above in each case remain in the case and subject to any sanctions that may be imposed by the court in these cases.

Once again, the defendants herein have raised as an issue the constitutionality of the law under which the state has brought this action. The issue was previously resolved by this court per Judge Alfred C. Hagan in his memorandum decision filed herein on July 15, 1977. Judge Hagan held that obscene matter is beyond the protection of the First Amendment to the United States Constitution and further that nuisance-abatement procedures, including those afforded by Idaho Statutes, are proper procedural methods to be used for the abatement of

obscene matter. (1) This court agrees with Judge Hagan's decision. What materials constitute obscene matter is susceptible of determination under guide lines established by the Idaho Statute and the United States Supreme Court Decisions.

This trial is concerned with the question of whether certain materials confiscated by the state and placed in evidence are obscene under the law.

The evidence in this case disclosed that both stores, by and through their owners and employees are engaged in the business of selling and showing pornographic materials consisting of motion picture films, magazines and newspapers. Most of the materials depict sexually explicit acts by and between males and females, males and males and females and females, in groups of varying size and content. To discuss this depicted conduct in detail, it seems

advisable to define some of the terms and words which can be used to make clear the nature and use of the material in question. This has been done by the attachment of a glossary to this opinion marked as Exhibit "A".

The proof in this action revealed that the defendants remaining in these cases owned and/or operated and/or were employed in "adult book stores" located in Garden City, Idaho, which were engaged primarily in the business of selling and showing pornographic materials consisting of motion picture films, magazines and newspapers. These materials were sold in the store over the counter. Motion picture films are shown by means of arcade machines located within booths situated on the premises which are designed for privacy of the patrons. A person can activate an arcade machine by inserting a quarter. He can

then view a segment of motion picture film depicting explicit sexual acts. When the film stops, the patron can continue the film by inserting another quarter. Generally each quarter produced for view explicit sexual activity, which continues until the film has completed its run. It takes four or five quarters to see the entire film. A film will play from about ten to twenty minutes to completion and repeats so long as quarters are supplied. These films are called "loops". It appears from the evidence of an abundance of seminal fluid on the inside walls and floors of these booths that many of the patrons are practicing acts of masturbation as they view the films. By providing these private booths for such patrons it appears that the book stores are knowingly and deliberately pandering to deviant group, by providing them with a source of visual stimulation in a setting

encouraging semi-public masturbation. The presence of seminal fluid on the walls and floors of the arcades is also telling evidence of the films' appeal to a prurient interest in sex, at least among some of these arcade patrons.

Many of the same films which may be seen in the arcade booths in these stores may also be purchased over the counter. Most of the films admitted into evidence were orgiastic in nature depicting group sexual activity consisting primarily of cunnilingus, fellatio, anal and coital sexual intercourse. The films were all in color and apparently designed to depict lust, pure and simple, i.e. the material never depicted sexual activity as an expression of love or affection.

The state, at the time of bringing these actions, acquired certain materials which have been presented to the court as

evidence in these civil cases. State investigators, and law enforcement agents, acquired the evidence in this case by personally visiting the defendant bookstore in February, March, April and May of 1977. Acting as patrons, they gathered the evidence presented, by observing the operation of the stores and purchasing the merchandise which is the subject of this action. The materials and arcades were available to the agents in the same way in which they are made available to the public. The state seeks to abate the materials as a nuisance, and further presumably, seeks the establishment of a judicial standard as to what type of materials constitute obscenity so that at a later date, the state can bring criminal actions under the applicable criminal statutes covering dissemination of obscene materials. The Idaho legislature has provided for criminal sanctions to be imposed

upon purveyors of obscene materials in I.C. §18-4101 et. seq. Since the same First Amendment standards must be met in defining obscenity in civil actions as in criminal actions, the court decisions made in moral nuisance actions can provide clearer legal guidelines by determining the community standards to be used. This will provide guidelines for businesses engaging in the sale of questionable materials, allowing them to conform their conduct to the requirements of the law. It will also provide law enforcement officials with a more concrete basis for enforcement of criminal obscenity law. The court is therefore mindful of the criminal implications of the determinations made in this decision. This course of action was suggested as a reasonable course to follow in the decision of the United States Supreme Court in Paris Adult Theatre v. Slaton, 413 U.S. 49, 37

L.Ed.2d 446, 93 S.Ct. 2628 (1973).

The Idaho Statutes covering these cases are I.C. §52-401 et seq. These statutes provide the obscene materials may be abated as moral nuisances.

Nuisances are defined in Idaho Code Sections 52-101 et seq. Moral nuisances are defined in Idaho Code Section 52-103, as follows:

> "As used in title 52, Idaho Code, relating to moral nuisances.
>
> (A)***
>
> (B) "Lewd Matter" is synonymous with "obscene matter" and means any matter:
>
> (1) which the <u>average person applying contemporary community standards</u>, would find, <u>when considered as a whole</u>, appeals to the <u>prurient</u>

interest; and

(2) which depicts or describes patently offensive representations or decriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

"Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value."

Idaho Code 52-103 was made into its

present form in 1976. This was a few years after a series of cases, which reviewed most of the criteria of obscenity, were handed by the United States Supreme Court in 1973. These cases were:

Miller v. California
413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607

Paris Adult Theatre v. Slaton
413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628

Kaplan v. California
413 U.S. 115, 37 L.Ed.2d 492, 93 S.Ct. 2680

United States v. 12 200 ft. Reels of Super 8 film.
413 U.S. 123, 37 L.Ed.2d 500, 93 S.Ct. 2665

Miller dealt with pornographic advertising, Paris Adult Theatre involved motion picture films and Kaplan considered printed material.

Twelve 200 ft. 8 mm. film discussed short pornographic films like those involved in these cases.

In the above cases, the U.S. Supreme Court attempted, again, to grapple with standards for the determination of what can be established to be obscene, and may be prohibited or regulated by the states. Miller as the lead case in the series establishes the core of the legal standards. After reaffirming that obscene materials are not protected by the 1st Amendment to the U.S. Constitution, the Court defined obscenity. The Court noted that in Memoirs vs. Massachuesetts, 383 U.S. 413, 16 L.Ed.2d 1, 865 Ct. 975 (1966), the Court in a plurality decision, veered sharply away from the Roth (2) concept and articulated a new test of obscenity. The Court held that under the Roth definition

"as elaborated in subsequent cases,

three elements must coalesce: it must be established that

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;

(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

(c) the material is utterly without redeeming social value. (emphasis added)

The Court notes that while Roth presumed "obscenity" to be "utterly without redeeming social value, 'Memoirs required that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value'". Thus, even though the Court repeated Roth, Memoirs

added a new element, i.e. the state had to prove the negative proposition that the material was "utterly without redeeming social value". In Miller it was observed by the Court that this was a burden which was virtually impossible to meet.

In Miller the Court remarked that the author of Memoirs had abandoned this position and further that no member of the Court today supports it. The U.S. Supreme Court now says that state statutes designed to regulate obscene materials must be carefully limited. The Court continued:

> "As a result, we now confine the permissable scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which, taken as a

whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

"The basic guidlines for the trier of the fact must be:

(a) whether "the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic political, or scientific value."

Note that the court therefore stated that they did not adopt as a constitutional

standard the "utterly without redeeming social value" test of Memoirs.

Continuing, the U.S. Supreme Court emphasized in Miller that it was not their function to propose regulatory schemes for the states. The court said "that must await their concrete legislative efforts". But then the Court said "it is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standards announced in Miller". Here are the court's given examples of what the states can proscribe by statute:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition

of the genitals."

An examination of Idaho's statute passed in 1976 will clearly reveal the Idaho legislature did its best to pass a law conforming to the Miller criteria.

In Miller the U.S. Supreme Court noted further that what constitutes "prurient interest" and "patently offensive" could vary from state to state. The trier of the facts, usually a jury, was left to be the ultimate fact finder in these areas. In the case at bar, the court is the trier of these facts.

Miller further took note that, applying the "average person" standard, the material is to be judged by its impact on an average person, rather than on a particularly susceptible or sensitive person or a totally insensitive person. As to material taimed at any deviant group, the court was vague. However, if the material is available to

"average persons" it will have to be judged on that basis. It is clear from Miller and its progeny, that "censorship" via state legislation is constitutionally permitted. There are, of course, limitations on the power of the states to censor printed and pictorial materials. (3) States may not interfere with the dissemination of constitutionally protected materials. However, states may regulate "obscene" materials to whatever extent the legislature desires, since they are not afforded constitutional protection. The legislature, therefore is free to set any standard of regulation ranging from none, to the prohibition of the disemination of any "obscene" material, as it is defined in Miller. Therefore in each instance the court must first consider whether the material is "obscene" according to the Miller standard and then whether Idaho's Statutory scheme includes the

material in question. The legislature, in enacting the statutes involved, clearly intended to exercise its censorship function through the court system. The statutes are drawn in language nearly identical to the language used in Miller, leaving the courts to determine the meaning of "prurient interest" "patently offensive" etc.

The courts are a logical body to be chosen to exercise the censorship function. They are better equipped than the legislature to grapple with the U.S. Supreme Court interpretations of the First Amendment issues, and are aided by the fact-finding mechanism of juries. So long as courts are able to properly apply First Amendment principles (and instruct juries to apply them) a viable and constitutional system of obscenity regulation can be maintained. To the extent of legislative regulation, and within the limits set by Miller and its companion

cases, the determination of what is "obscene" is a judicial function, to be performed by the state court system.

Having these guidelines in mind, the court in developing a criterion under the Miller tests and the Idaho statute has considered just what is meant by the words, "prurient interest". Webster's New Collegiate Dictionary says "prurient" means (1) marked by restless craving (2a) having lascivious thoughts or desires: LEWD(b) arousing such thoughts or desires. The "prurient interest" discussed in reference to these cases is not the Webster definition. In these obscenity cases, the words "prurient interest" connote something more. And expert witness for the defense, famous sexologist, Robert Theodore McIlvenna of San Francisco, California stated his opinion that "prurient interest" means a morbid interest. According to Webster's New

Collegiate Dictionary, "morbid" means "of or relating to disease"; or "characteristic of disease"; or "affected with or induced by disease". A secondary meaning was listed as "abnormally susceptible to or characterized by gloomy or unwholesome feelings". This last mentioned meaning is undoubtedly the construction the defense expert would place on the definition of "morbid".

By way of example of what sort of depiction the defense expert regarded as appealing to the prurient interest, he stated he had seen a film produced in Morrocco in which a club-footed boy's arms were attached to two horses which then pulled in opposite directions so that the boy was torn apart. As this was going on, men standing around masturbated. The expert said this was an appeal to the "prurient interest". By way of further example, he cited films wherein two men actually raped a young girl, and

as they left, they kicked her in the face. The defense expert regarded such films as appealing to the prurient interest. Further, he said any materials exploiting children for purposes of pornography would appeal to the prurient interest.

The defense expert drew the line at the depiction of violent acts. In his opinion, sexual depictions involving violence or children appealed to the prurient interest. Any depiction of non-violent sexual conduct was not in the prurient interest. The defense expert's testimony, establishes his bias which does not appear to coincide with what the Idaho Legislature regards as appealing to the prurient interest. The Idaho Legislature has stated specifically that an appeal to the prurient interest could exist in materials which depict patently offensive representations or depictions of ultimate sexual acts,

normal or perverted, actual or simulated or masturbation, excretory functions or lewd exhibition of the genitals or genital area. (I.C. 52-103). The Idaho Statute does not require depictions of violence or exploitation of children as a prerequisite for a finding that depictions of sexual conduct are designed to appeal to the prurient interest.

The defense expert's concept that "prurient interest" means a "morbid interest" was, apparently, also expounded in ALI, Model Penal Code, Sec. 207.10(2) (Tent Draft No. 6, 1957) which said:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shamful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of Candor in description or representations

of such matters."

Courts have noted that apparently the U.S. Supreme Court in Alberts vs. California (1957) approved the ALI concept.[4] Since then, many courts have regarded "prurient interest" as meaning "morbid interest" even to the point that violence in sex was regarded as a prerequisite to a finding of obscenity. In some cases even doubtful violence was not enough.[5] It is understandable that the defense expert has concluded that "prurient interest" means "Morbid interest" which means violence in sexual depictions.

However, since Miller, the drift of decisions appears to be moving away from any requisite of violence in deciding whether sexually explicit materials are obscene. It seems clear, though, that the judges deciding these cases still look at the materials to see if they depict a "shameful

or morbid" interest when deciding whether the materials appeal to the prurient interest in sexual matters.(6) In addition, it appears that some courts are considering any "pandering" of written or graphic material in determining whether the materials are obscene.(7) A recent case in the federal 9th circuit court of appeals noted that in a close case, evidence of pandering may be considered in determining whether elements of the three pronged obscenity test have been met. Childs v. Oregon (9th Cir), 431 F.2d 272; Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942 (1966).

Thus, the court as fact finder in the cases at bar will judge the materials involved having in mind that "prurient interest" means morbid or shameful interest, or expressed in another way, the court will look at the materials to see if they are

characterized by depiction of degradation or degeneracy; but the court will not require depictions of violence in sex although such violence, if any, would have to be considered.

The court will also look at any facts constituting pandering.

As to the matter of what the "average person, applying contemporary community standard" would find appeals to the prurient interest, as factfinder the court will have to rely on its own notions of "average person" and "contempory community standards". The court discounts the testimony of the expert witnesses on both sides in these areas. The testimony of the defense expert by his own admission concerned people suffering from some sexual dysfunction and not the "average person". The same is basically true of the testimony of the state's experts, LeMar Heyrand, M.D. and

Psychologist Zane Parker Nelson. Dr. Heyrand's testimony was firm in some areas as to the state of community standards concerning prurient interest but he wavered in other areas indicating to the court that he really possessed no more insight into what the community standards are than does the court. Dr. Nelson's testimony by his own admission was influenced by his devotion to his particular religion which place his moral standards somewhat above many "average" persons in the community.

Both Dr. Heyrand and Dr. Nelson disclosed a sympathetic attitude toward people with sexual dysfunctions and seemed to be apprehensive that judicial decisions in areas of obscenity might somehow affect the ability of those persons to enjoy a quantum of sexual gratification in their lives. The same must be said of the defense expert. While this attitude causes the

court to discount their testimony on the contemporary standards of the community as to what constitutes obscenity, it should be made clear that sexually explicit materials used by physicians and psychologists in treating sexual dysfunctions or which may reasonably be successfully used by people in solving any such problems for themselves would logically possess a scientific value which would take the material out of the ambit of obscenity unless such materials are misused or "pandered" to the public.

The court further believes that any expressions as to what the law is or should be by the state's expert witnesses after bagering cross examination by defense attorneys should be largely discounted. There were no valid surveys presented to the court as to what the standards are in this community and the opinions of the experts

really cannot be counted as evidence because there was no valid foundation laid to show any basis other than conjecture for their opinions as to standards in this community. No Treasure Valley Kinsey report was presented to the court or anything that could tend to establish the actual community standards. Thus the Court is left with the function of determining such standards as fact finder. Perhaps a jury could do the job better. Many cases found by the court and cited in this opinion frequently refer to the inherent ability of juries to determine community standards.

Both sides refrained from any demand for a jury. Counsel for both sides are well acquainted with the background and character of the court. Both sides should have to acknowledge that at the bottom line, in such circumstances, the court would be forced to determine the contemporary

standard of the community. This is in keeping with the rule in U.S. Supreme Court holdings regarding "obscenity per se". Although the concept has been primarily developed in the state courts and the lower federal courts, it has been explicitly adopted by the U.S. Supreme Court. The rule, simply stated, is that no expert testimony concerning either the community standards or the individual materials is necessary to establish their obscenity. The materials are held to "speak for themselves" and are regarded as the best evidence of their own essential nature. Ginzburg, supra; Paris Adult Theater, supra. Expert testimony is often helpful, and in some cases may be necessary (as in the case of State's Exhibit No. 28 infra). Nevertheless, a judge or jury will always be called upon to employ the common knowledge of everyday experience in assessing the

standards of the average person in the relevant community. When sexually explicit materials are clearly beyond the level of tolerance of the average person and are "patently offensive" on their face, then a determination that the materials are obscene as a matter of law, or constitute obscenity per se, is warranted without recourse to expert testimony, if any.

With these matters in mind the court will now proceed to discuss and evaluate the materials in evidence, item by item.

The first items are State's Exhibits No. 10 and 10(a), purchased at U.S. Marketing by a State's investigator on February 17, 1977. State's exhibit 10(a) is an arcade film loop purchased over the counter after it was seen in an arcade booth by the state's investigator. State's exhibit 10 is the box in which the film was contained. The price listed on the box is

$34.95, apparently, marked down from $60.00. The title of the film is "Deep Ass". A picture on the box depicts a man performing cunnilingus on one female subject at the same time he is performing anal intercourse with another female. Wording on the box in porno vernacular says that a subject named Tom, obsessed with thoughts of sex throws a raincoat over his erect penis and visits two extremely well sexed beauties named Helen and Janis. The box says "What they do to him should happen to any man", the finale coming as Tom "sinks" his penis into Janis' anus and after he has ejaculated Helen licks his "creamy" penis clean, "A porno masterpiece". Exhibit 10(a), the film inside the delivers the material promised in the box in living and highly active color.

Applying the statutory test, the court finds the average person in the Boise-Garden

City area, applying contemporary community standards would find that this material when considered as a whole appeals to the prurient interest in sex as a morbid interest. The material depicts and describes patently offensive representations and descriptions of ultimate sexual acts, perverted and normal, and actual or simulated. It depicts lewd exhibitions of genitals and genital areas.

The Court finds that since this material is exhibited in an arcade booth available to the public the walls of which are covered with seminal fluid that it panders to those patrons who visit U.S. Marketing to masturbate while viewing the arcade loops.

Nothing was contained in the material, when it is considered as a whole, which possesses, in any context of use, any serious literary, artistic, political or

scientific value. State's exhibits 10 and 10(a) purchased at U.S. Marketing, Inc., are obscene under Idaho law.

The next items are State's exhibit's numbered 11 and 11a. This is a film loop (ex. 11) in a box (ex. 11a) entitled "Anal Party". The items were purchased for money at U.S. Marketing. A brochure accompanies the exhibits describing several film loops sold by Bang Bang Films and described as "The Finest High Quality Adult Home Entertainment". It is priced at $50.00 per film. The brochure in words and pictures describes six 45.7 meter film loops, No. 1 is "Bottoms Up". The film strip is described as depicting a situation in which:

> "A voluptuous blonde and her equally sensuous brunette girlfriend take advantage of a quiet sunbathing session in the woods to begin to fondle each other. This soon becomes passionate

probing which continues until a trio of young men arrive on the scene. Soon they are deeply involved in a five way orgy."

A picture shows two men performing anal intercourse on two women as one of the women performs an act of fellatio on the third male.

The description of film loop No. 2 tells the title is "Erotic Fantasies". The description of the material says:

"Alone and unloved, an oversized and desperately horny blonde uses every tool she can get her hands on to help satisfy her burning need. As she probes deeply into the twilight world of autoeroticism, her fantasies produce wild images of uncharted odysseys of lust. Finally, she calls up her boy-friend, who does everything he can, and thats a lot, to satisfy her."

A picture shows the blonde licking the end of her boyfriend's erect penis.

Film loop No. 3 is entitled "French Riviera". The film is described in the brochure. The story:

> "A young couple vacationing on their honyemoon are sightseeing abroad. The husband is trying to take home movies, but the foxy young wife has other sights in mind. Spotting a handsome young man she strikes up a conversation that leads to a two sex orgy in the picnic grounds. One embrace leads her into exploring the European way of getting off, and they are both pleased with the experience."

The picture shows a male subject ejaculating on the bosom of the bride as a result of her apparent handling of his penis.

Film loop No. 4 entitled "Anal Party" is described as a film showing the following:

> "Three sexy young working girls from various professions ask a couple of guys they have just met to come over to their house for a few drinks and some good times and what good times they are, for no sooner do the guys arrive when the girls start undressing. It's a non-stop orgy, as the guys get it on and soon everyone is deeply involved."

The accompanying picture shows a girl performing an act of fellatio upon a male.

The film loop, (exhibit 11a) delivers the promised orgy depicting several normal and perverted sex acts including cunnilingus and fellatio. The film culminates in a male masturbating and his semen being rubbed into the back of one of the girls.

Items five and six described in the brochure describe film loops entitled "Pajama Party" and "Saucy Sextet". Both

described films are said to depict wall to wall "sexual orgies." Bang Bang film No. 5 introduces an actor, "Big John" Holmes who has an extremely large penis expecially when erect. Defense expert witness Robert McIlvenna said that he was acquainted with John Holmes and that he was a congenial young fellow who makes his living as a porno star. He is said to have made over 1000 films and to have fan clubs located all over the country.(8)

Applying the statutory test to those materials, it is clear that the average person, because of the orgiastic nature of the materials, applying contemporary community standards would find, when considered as a whole, that these materials appeal to the prurient interest and that they do depict and describe patently offensive representations or descriptions of ultimate sexual acts, normal and

perverted, actual and simulated, masturbation, execretory functions and lewd exhibition of genitals and genital areas.

The court can see nothing in the materials, which when considered as a whole, possesses serious literary, artistic, political or scientific value.

This material is being pandered to those desiring to masturbate in the arcade booths.

The court finds that State's exhibits 11 and 11a constitute obscenity under Idaho law.

State's exhibits No. 12 and 12(a) are a film box and arcade loop film entitled "Laura's Toy". The exhibits were purchased from U.S. Marketing after having been viewed by a state inspector in an arcade booth. The descriptive words on exhibit 12, the box, tells how Laura, a fourteen year old girl, while going through her mother's

closet discovered a bagful of adult toys including her mothers dildoes, vibrating hands and other stimulating devices. In the film she uses these, particularly the dildo, which appears to be about a foot long and 1 1/2 inches in diameter by inserting it into her vagina and using it for prolonged masturbation. Eventually she uses the device in her rectal area and is seen licking the dildo and simulating and act of fellatio upon it. The box shows a picture of impassioned Laura lying back on her furry pillow with her hands narcissistically fondling her childish bosoms.

The film loop apparently sold for $34.95 marked down from $60.00.

Applying the tests of the statute, the court finds that the average person, applying contemporary community standards, would find that the material when considered

as a whole, appeals to the prurient interest and that the material depicts masturbation and lewd exhibition of the genitals and genital area. The Court sees nothing in the material which possesses serious literary, artistic, political or scientific value.

The material, furthermore, was used in the arcade booth to pander to those who go there to masturbate.

This film also exploits a child for pornography. The defense expert defined the child as one who is at a prepubescent stage of growth. Laura in the film is past that stage. However, Idaho Statutes in every area of the law would define a fourteen year old as a "child".(9) It is clear that Laura depicts a child as defined by Idaho law. Laura appears to be as represented, i.e., 14 years old.

The court holds that State's Exhibits 12 and 12(a) are obscene under Idaho law.

State's Exhibits No. 13 and 13(a) are a film box and an erotic film entitled "School Report". These materials were purchased by a state agent from U.S. Marketing, Inc., marked down from $75.00 to $34.95 after viewing in the arcade machine. The box, on the back side thereof, advertises other releases and shows and describes various acts of fellatio and normal sex. The film loop shows two school girls in uniform on their way to school. They are following a boy. They arrive in the classroom about 8:55 A.M., the boy shoots an object at the blackboard with a flipper interrupting the male teacher's lessons. The teacher accosts the boy, attempting discipline. The girls intercede apparently with suggestions for other activities. The blackboard is removed from the wall and set up horizontally. The two girls, the boy and the teacher all mount the

blackboard and perform various acts of a sexual nature both "two way" and, orgiastically, "four way". The acts consist of cunnilingus, fellatio and normal sex. At the end of the school day, the activity stops, the school room is placed back in order, the people get their clothes on. The teacher stays. The two grils and the boy arm in arm happily wend their way home.

Applying the Idaho Statute, the Court finds that the average person applying contemporary community standards, would find, when the materials are considered as a whole, that these materials appeal to the prurient interest. The materials depict and describe patently offensive representations and descriptions of ultimate sexual acts, normal and perverted, actual or simulated. They show lewd exhibitions of genital areas and genitals. The Court can see no serious literary, artistic, political

or scientific value in any of these films. The court finds that the film (exhibit 13a) as used in the arcade machine, pandered to those who visited U.S. Marketing, Inc., to masturbate. The court finds that under Idaho law exhibits number 13 and 13a constitute obscenity.

State's exhibits number 14 and 14a is a film box, advertising brochure and film loop purchased by a state agent on March 8, 1977 from defendant Melvin Winn at the adult book store known as Niks and Naks in Garden City, Idaho. The advertising brochure promotes sexual films from Swedish Erotica entitled "Seaplane Sex", "Sauna Bath", "Black in White", "Window Shopping", "An Anatomy Lesson", "Downtown Hotel", "The Repairman" and "Rock Hard". The box and brochure depict in color and describe, forms of sex contacts including sodomy, cunnilingus and fellatio. The film (ex

14a) is "Window Shopping". The film shows two female roomates, one black and one white who decide to go window shopping. They go to a ski shop but they do not stay long. From there they go to the apartment of the white girl's boyfriend. He is in the shower. While they wait for him to come out, the girls fondle each other. As their passions rise, the boyfriend joins in the fun. The action proceeds through several various kinds of sex acts including cunnilingus, and fellatio all around. The action concludes as the man masturbates to a climax ejaculating and the white girl licks the semen.

There was no solid evidence as to pandering of this particular film although Niks and Naks does maintain arcade booths and witnesses testified as having seen what appeared to be fluid on the walls of the arcade booth.

Applying the Idaho law, the court finds that the average person, applying contemporary community standards would find that these materials when considered as a whole appeal to the prurient interest. The materials depict patently offensive representations or descriptions of ultimate sexual acts, normal and perverted, actual or simulated and also depict masturbation and lewd exhibition of the genitals and genital areas. The Court holds that under Idaho law, the materials, (ex 14 and 14a) are obscene.

State's exhibits 15 and 15a were purchased on May 9, 1977 from Niks and Naks by a state agent. The material is from Swedish Erotica and consists of the box, an advertising brochure and a film. The brochure advertises several erotic films with illustrations and textual materials showing and describing many forms of sexual

intercourse, normal, oral, manual, anal and orgiastic.

The films advertised in the brochure are "Passionate Pilot", "Coed in the Van", "Oversexed Secretary", "Stuffed Rears", "Secret Weekend", "Warm, Wet and Wild", "The Pleasure Palace" and "Sorority's Stud". Again, the color pictures in the brochure depict and describe sexual acts of fellatio, cunnilingus, buggery, and intercourse per oros and per anus, sometimes in groups of three.

The film (exhibit 15a) is "Passionate Pilot". A helicopter pilot arrives at the airport and forthwith goes to visit two girl friends who have been waiting for him as they loll around his indoor swimming pool in their see-through underwear. They all start to go skinny dipping in the pool, but can't wait, so proceed immediately to many forms of sexual exercise, three ways

in various forms orally, anally and normally. As the film ends, the pilot by masturbating ejaculates into the faces of the girls.

Applying Idaho law, the court finds that the average person, applying contemporary community standards, would find, that the materials in question when considered as a whole, appeal to the prurient interest. The materials depict and describe patently offensive representations and descriptions of ultimate sexual acts both normal and perverted and actual or simulated. The film shows masturbation and lewd exhibition of the genitals and genital areas. The court can see no serious literary, artistic, political or scientific value in any of the materials in question. The court finds that under Idaho law, State's exhibits number 15 and 15a constitute obscenity.

State's exhibits number 16 and 16a in another package by Swedish Erotica consisting of a box, a brochure and a film entitled "School Girl's Delight". This package was purchased by a state investigator from Niks and Naks. The box on the back side, advertises other erotic films describing and depicting sex acts normal and perverted showing copulation both orally and anally. The advertising brochure shows and describes films entitled "International Boutique", "Orgy In Leather", "Black Knight", "The Jogger", "Whipped Cream", "Schoolgirl's Delight", "Enchanted Cottage", "Giesha on the Gunza", "The Architect", "Homework", "Black and White Lez Orgy", "The Visitor", "The Workman", "The Elevator", "The Dreamer" and "Polynesian Princess". This advertising material depicts sexual intercourse orgiastically in doubles and triples, in most forms of sodomy, fellatio and cunnilingus,

with use of tongue, penis and dildos.

The film "Schoolgirls Delight", shows two young girls becoming impassioned from looking at the pictorial pornography materials owned by the father of one of the girls. They start tongueing each other and then decide to call a boyfriend from biology class. They phone him and he comes over. The girls remove their clothing and his clothing. They go after him sexually using some of the techniques depicted in the father's books. He eventually comes to a climax ejaculating between the breasts cf one of the girls.

The court finds that the average person applying contemporary community standards would find that the foregoing mentioned materials, when considered as a whole, would appeal to the prurient interest. These materials depict and describe patently offensive representations and descriptions

of ultimate sexual acts, normal and perverted, actual and simulated and lewd exhibition of genitals and genital areas. The court can see nothing in the materials which constitutes serious literary, artistic, political or scientific value.

The materials in State's exhibits 16 and 16(a) are obscene under Idaho law.

State's exhibits 17 and 17(a) were purchased by a state's agent on March 4, 1977 from U.S. Marketing, Inc. These exhibits constitute an erotic film package consisting of a box and a film entitled "A Jug of Wine and Thou". The box shows a young black teenage girl fornicating with a "far-out" hippie, who according to advertising on the box digs Dago Red, Acapulco Gold and sex. He "scores" on all three. The box advertises other films picturing and describing acts of fellatio, double and single and depicting a man

ejaculating into the face of a female subject. The film depicts a young black female doing various acts of fellatio and other sex acts on the "hippie" she has picked up. During this time, the hippie is partially stoned on drugs and is having hallucinagenic "flashbacks" of a sexual nature as he cassionally takes a sip of wine out of his boda bag. When the man eventually comes to a climax, he ejaculates on the girls bosoms. She rubs the seminal fluid around on her breasts with her hands as the film ends.

Once again, the court finds that an average person, applying contemporary community standards would find that these materials when considered as a whole appeal to the prurient interest. The materials depict and describe patently offensive representations or descriptions of ultimate sexual acts, normal and perverted, actual

or simulated and masturbation and lewd exhibition of the genitals and genital areas.

The court can see nothing in these materials which constitutes any serious literary, artistic, political or scientific value.

The materials in this package, State's exhibit 17 and 17(a) constitute obscenity under Idaho law.

State's exhibit 18 and 18(a) are a film box and film depicting erotic materials. The film is called "Balloon Party". This material was purchased from U.S. Marketing, Inc., on March 10, 1977. The box shows a naked man watched by a naked woman as he masturbates at a container held by a second girl in a kitchen. The back of the box advertises other erotic materials showing various acts of sex including fellatio and sodomy in twos and threes.

The film "Balloon Party" begins with

two disrobed girls and a disrobed man playing with balloons and themselves. They soon begin acts of fellatio and cunnilingus and also sex in a normal way. There is much switching around, orgy fashion. Eventually the man signals one of the girls to go make a drink. She leaves the other two at their play and proceeds into the kitchen where she mixes up a milkshake in the blender. Soon the other two come into the kitchen. Sex action continues in there until the man comes close to a climax whereupon he masturbates semen into the milkshake held by one of the girls. She mixes up the seminal fluid into the milkshake and then drinks the milkshake. The film ends at this point.

The court finds that the average person, applying contemporary community standards would find that the materials in State's exhibits 18 and 18(a) when

considered as a whole would appeal to the prurient interest. Further, the materials depict and describe patently offensive representations and descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and masturbation and lewd exhibition of the genitals and genital areas.

The court can see no serious literary, artistic, political or scientific value in the materials in state's exhibits 18 and 18(a).

The court finds that the materials in these exhibits are obscene under Idaho law.

State's exhibits No. 19 and 19(a) are a film box and a film purchased by a state agent from U.S. Marketing, Inc. The box shows three male homosexuals performing fellatio, one to one to another. One of the males looks almost female. The film begins by showing the three using marijuana.

They are "stoned". Gradually, they come to life, start playing with each other and become aroused. They then continue performing acts of fellatio and sodomy on each other until coming close to a climax. At the end, they masturbate ejaculating seminal fluid on each other which is rubbed into the man's chest.

The court finds that the average person applying contemporary community standards would find these materials when considered as a whole appeal to the prurient interest. The materials depict and describe patently offensive representations and descriptions of ultimate sexual acts, and perverted acts, actual or simulated and masturbation and lewd exhibition of the genitals and genital areas.

The court can see no literary, artistic, political or scientific values in any of these materials.

The court finds that states exhibits No. 19 and 19(a) are obscene under Idaho law.

State's exhibits twenty (20) through (29) are printed materials, magazines or newspapers. These will be handled in a different way in this opinion, so the court will skip over to other films, state's exhibits 30, 30a, 31, 31a, 32, 32a, 33 and 33a.

State's exhibits 30 and 30(a) constitute an erotic film package purchased from Niks and Naks by a stage agent from a display rack therein. The material was procuded by Swedish Erotica. The box and brochure included in the box advertise other erotic films entitled "Pure Passion", "Large and Small", "Golden Showers", "Good Neighbor Sam", "Pure Passion, Part II", "Office Meeting", "Wedding Night Orgy", "New Spanish Fly". The advertising pictures

and describes sex acts being performed orally, anally and normally. The advertising for the film "Pure Passion Part II" describes and pictures a couple who having completed several sex contacts via the various orifices in the body, are in the showerstall with the woman laying back as the man washes seminal fluid off her face and chest by urinating upon her.

The advertising for the film "Golden Showers" depicts a woman urinating in the faces of two naked young girls as they tongue each other at a party described as celebration of "five frisky girls" upon graduation from boarding school. Advertising for the film "Lesbian Passion" shows two girls exciting each other by tongue, while the third girl penetrates the rectum of one of the two girls with a dildo.

The film "Pure Passion Part II" (state's exhibit 30(a)), delivers the goods

as advertised. After completion of sexual acts orally and otherwise, the man eventually ejaculates into the face of the girl. He then invites her to the bath tub where he very kindly washes off her face by urination. She shows her pleasure by guiding the urine into her face and by drinking some of it.

The court finds that these materials in state's exhibit 30 and 30(a) are such that the average person, applying contemporary community standards, would find that the materials when considered as a whole appeal to the prurient interest. The materials depict and describe patently offensive representations and descriptions of ultimate sexual acts, normal and perverted, actual and simulated, and masturbation, excretory functions and lewd exhibition of the genitals and genital areas.

The court can see no serious literary, artistic, political or scientific value

in any of these materials.

Under Idaho law, the materials in State's exhibits No. 30 and 30(a) are obscene.

State's exhibits No. 31 and 31(a) constitute a film package purchased from Niks and Naks by a State agent on March 4, 1977. The film is entitled "Musical Sex".

The box advertises other erotic films picturing and describing various sexual scenes involving copulatirn per oros, per anus and with dildos.

The film, "Musical Sex" shows three girls in bed. A man joins them to sexually confront all three girls. An orgy proceeds showing fellatio, cunnilingus and use of a dildo. Ejaculation occurs when the man masturbates directing his seminal fluid into the face of one of the girls.

The court finds that the average person applying contemporary community standards

would find when considered as a whole that the materials in state's exhibits 31 and 31(a) appeal to the prurient interest. Further, the materials depict and describe patently offensive representations and descriptions of ultimate sexual acts normal and perverted, actual or simulated. The materials show masturbation and lewd exhibition of the genitals and genital areas.

The court sees nothing in State's exhibits 31 and 31(a) of a serious literary, artistic, political or scientific value.

The court finds that under Idaho law State's exhibits No. 31 and 31(a) are obscene.

State's exhibit Nos. 32 and 32(a) were purchased from Niks and Naks by a state agent on March 11, 1977. This is a film package called "Five Way Ass Fuck Orgy". The extension of the box advertises Esquire Film Products. There is nothing of an

erotic nature depicted on the box. Inside the box there is a brochure advertising erotic films, and picturing sex acts being completed orally, anally and otherwise.

The above entitled film shows two men and three girls in a sex orgy. The film shows sexual intercourse being performed around among and between all five people orally, and anally, fellatio, cunnilingus and sodomy. One scene shows a man with his penis into the rectum of one of the women and her feces have spread onto her buttocks. Soon the penis is removed from the rectum whereupon the same penis is depicted as being taken into the mouth of one of the girls. The film closes with ejaculation by one of the men into the mouth of a girl by masturbation.

The court finds the material except the box in which they were contained, are such that the average person would find,

when considered as a whole that the materials, applying contemporary community standards, would appeal to the prurient interest. Further, the materials depict and describe offensive representations and descriptions of ultimate sexual acts, normal and perverted, actual or simulated and masturbation, excretory functions and lewd exhibition of the genitals and genital areas.

The Court can see nothing in those materials possessing any literary, artistic, political or scientific value.

The Court finds that the materials in the brochure and the film in State Exhibits 32 and 32(a) are obscene under State law. The box enclosing said materials is not obscene.

State's exhibits No. 33 and 33(a) was purchased from Niks and Naks by a State agent on March 11, 1977. The material is a film package consisting of a box and a

film. The title of the film is "Open Invitation". The box shows a picture of a young girl tonguing two penises simutaneously. No advertising brochure is included. The film (State's Exhibit 33(a)) shows two gentlemen playing backgammon. Nearby sits a young girl who has positioned herself so that all of her sexual parts are disclosed to the men. One of the men finds he cannot concentrate on the backgammon game under such circumstances so he finally approaches the girl and the whole scene quickly becomes an orgy with the usual performances of cunnilingus and fellatio. The girl performs fellatio on both men simultaneously. Typically, the film ends by one of the men coming to a climax by masturbation and ejaculating into the mouth of one of the girls.

The Court finds that the average person applying contemporary community standard

would find that these materials when considered as a whole appeal to the prurient interest. Further, the materials depict and descirbe patently offensive representations and descriptions of ultimate sexual acts normal and perverted, actual or simulated and masturbation and lewd exhibition of the genitals and genital areas.

The court finds no serious literary, artistic, political or scientific value in these materials.

The Court finds that under Idaho law State's exhibits 33 and 33(a) are obscene.

The Court will now turn to the printed materials and magazines admitted into evidence. Expert witnesses did not testify on these materials to any great extent. They were put into evidence and allowed to speak for themselves.

State's exhibits 20 through 29 were purchased by a State agent from U.S.

Marketing, Inc., where no browsing was allowed. The investigator picked the materials at random.

The Court will first list those publications which do pass the tests imposed by Idaho law and are not obscene with a brief explanation. Those publications which are obscene under Idaho law will also be listed. There may be one or two where the materials are borderline in which case, the materials will be given the benefit of any doubt.

Obscenity in publications is discussed in companion cases to Miller v. California. Basically, the requirements as to what constitutes "prurient interest" and "serious literary, artistic, political or scientific value are the same as for films."(10)

Publications which the court holds are not obscene under Idaho law are these:

State's exhibit No. 20 purchased from

U.S. Marketing, Inc., by a State agent, a slick paper publication called "Tongue". While this publication contains many pictures of explicit sex acts, most of the publication deals in the demonstration of various positions for sexual intercourse and discussion of methods to attack the common male problem of premature ejaculation in sexual intercourse. It does advocate the use of the tongue as one method of foreplay in accomplishing satisfactory sexual intercourse. The Court finds that this publication, being considered as a whole would not be found by the average person to appeal to the prurient interest. While it may illustrate and depict some types of conduct found offensive by the law, it does possess serious scientific value.

State's exhibit No. 21 was purchased at U.S. Marketing, Inc., by a State agent. It is a newspaper entitled "Screw: The

Sex Review", Number 408, for December 27, 1976, published by Al Goldstein. While this publication does contain numerous examples of obvious obscenity as proscribed by Idaho law, and while it contains advertising for erotic films and other materials, most of which might well be proscribed by Idaho law, its contents are presented in such a way that one can come to the conclusion that it should have first amendment protection, notwithstanding that many portions are scandalous. This paper is borderline, but it does not seem to appeal to any prurient interest in any morbid sense. It does possess some degree of literary artistic, political and scientific value. The Court cannot hold the material obscene under Idaho law.

State's exhibit 23 was purchased at U.S. Marketing, Inc., by a State agent. It is a slick paper magazine type

publication called "Score". It contains a few pictures that would be recorded as obscene under Idaho law. However, for the most part the material deals wtih sex as the expression of acts of love as distinguished from lust. Its materials would not appeal to a prurient interest in a morbid sense. It does contain both printed matter and sexually explicit pictures which do possess serious literary or scientific value. It is clinical in nature to a large degree and shold receive first amendment protection. It is not obscene under Idaho law.

State's exhibit No. 24 is a newspaper tabloid type publication called "San Francisco Ball", Issue No. 210. It was purchased from U.S. Marketing, Inc., by a State agent. It contains considerable material which is obscene under Idaho law. However, it also includes a feature story

concerning a Tennessee "porno" Prosecutor, Larry Parrish, who was invited to address the Adult Film Association. In this publication, the prosecutor tells the porno purveyors why they should get what they have coming to them. While "Ball" might have been borderline obscene without the Parrish story, ironically, the Parrish story resolves all doubts so the Court would have to hold that the publication does possess serious literary and political value. Accordingly, State's exhibit No. 24 is not obscene.

State's exhibit No. 26 is a tabloid type newspaper-magazine puchased from U.S. Marketing, Inc., by a State agent. It is a publication called "The Advocate", a gay liberation publication, Issue No. 211, March 9, 1977 in two Sections. State's exhibit No. 26 is part 2. This item is oriented to the homosexual male. As its

title implies it is essentially an advocate of gay rights. It is more political than pornographic. Some of the classified section advertises sex partners, but no explicit sex is shown. The publication is definitely afforded first amendment protection and in no way can be regarded as obscene under Idaho law.

State's exhibit No. 28 is a magazine type publication purchased from U.S. Marketing, Inc., called "Rubberlife". The materials are directed at people who obtain sexual excitement from the feel of rubber materials like rubber panties, rubber or latex clothing and rubber or latex sheeting material. Much of the material in the publication is narcissistic, and lesbian and slanted toward those characterized by unique aspects of infantilism. Some of the material is heterosexual in nature. Nearly all of the material is preoccupied with

the theme of dominant females over submissive females or males. The materials are somewhat concerned with people obtaining sexual satisfaction from mild flagellation, sexual humiliation, and "water sports" (urination). However, most of the materials deal with a rubber fetish that, for the most part, is brought out in childhood by dominant matriachical figures and by superficial treatment of enuresis in people when they were children by installing them in diapers and rubber pants on into their teen years. Adults who thereby have come to love rubber write letters to the editor of "Rubber Life" sharing their experiences telling how they got that way and how glad they are that they are still that way. Apparently they enjoy their fetish. The publication does contain stories relative to rubber designed to be sexually exciting, some from a mildly masochistic point of

view. From the publication itself, the Court cannot tell for sure whether it panders to those who like rubber or whether it provides as a saving feature to any obscenity therein, a method by which people with psychological hangups can work out their problems. The State has supplied no evidence or expert testimony on this subject for the enlightenment of the Court. Accordingly, the Court must give this material the benefit of any doubt and hold that the State has not proved that State's exhibit No. 28 is obscene. However, the Court will take the position without prejudice to any further action the state may desire to pursue in respect to this type of material.

State's exhibit No. 29 was purchased from U.S. Marketing, Inc., by a State agent and it is a magazine published every two months for swingers called "Rocky Mountain

Connection". The issue for January, February, 1977 in evidence is essentially a classified advertising issue whereby couples who wish to meet other couples for purposes of spouse exchanging and other indicia of friendship can place advertising and thereby get together. The issue advertises motels in the western area "where swingers meet". It contains some explicit photos of genitalia in the classified advertising. There are some written articles on the subject of swinging. While the exhibit might be characterized as scandalous, it does not come close to constituting obscenity under a sufficient number of the tests required by Idaho law.

Plaintiff's exhibit 34 is a magazine purchased by a State agent from Niks and Naks on February 15, 1977. It is entitled "Young and Horny". This document shows ultimate sex acts in several positions

between one man and one woman. It also shows the inducement and apparant enjoyment of sexual excitement by fellatio and cunnilingus. It contains some textual material describing the orgasm in clinical language. While it does contain depictions of ultimate sex acts in several fashions, normal and oral, it does not seem to appeal to the prurient interest in the morbid sense. It does appear to be saved by literary content. It could be used clinically as an educational device. Its title detracts from such a purpose but the Court does not feel that it quite reaches the state of obscenity as defined in the Idaho law.

State's exhibit No. 37 was purchased by a State agent from Niks and Naks on March 18, 1977. It is a magazine called "Schar Lee". It shows sex acts by racially mixed male and female couples, including coital and oral copulation. One picture shows

a sex act per anus. Printed material is clinically presented discussing sex and marital sex problems. Any obscenity in this document is cancelled out by certain materials with serious literary or scientific content. The publication, considered as a whole, cannot be found to constitute obscenity under Idaho law.

State's exhibit No. 38 is a magazine called "Coming" purchased by a State agent from Niks and Naks on May 9, 1977. It contains several written articles accompanied by pictures of explicit sex acts naturally per oros and in groups to illustrate the textual material. One article entitled "Different Culture, Different Sex". It is essentially a "position" article describing various positions for the sex act between male and female couples. Another article "Kill That Son of A Gun" decries violence on television going uncensored while censors

will outlaw a picture of cunnilingus. Another article entitled "Old-Young Sex" tells how some young people of both sexes would rather enjoy sexual experiences with older people of the opposite sex. Another article is entitled "The Swapping Swingers". It tells how swingers not only "swap mates" but how they indulge in orgiastic sex. Another article is entitled "Cunnilingus, Antidote to Marital Boredom". It advocates as the title implies. Another article is entitled and tells how "Nudity is Normal". Another article "Communal Living" tells about sex in the commune. An article "Sex and Sorcery" deals with sex expressions and contacts as a part of devil worship. The way these materials are presented, as a factual, feature newsstory-like presentation of what is actually happening, places these materials under first amendment protection notwithstanding the presence of

lewd pictures illustrating the points made in the articles. This exhibit cannot be held to constitute obscenity under Idaho law.

The following materials appear to the Court to be such that the average person, applying contemporary community standards when considered as a whole would find that they appeal to the prurient interest and depict patently offensive representations and descriptions of ultimate sexual acts, normal and perverted, actual or simulated, and masturbation, excretory functions or lewd exhibition of the genitals and genital area and which the Court further finds possesses no serious literary, artistic, political or scientific value.

State's exhibit 22, a paper magazine entitled "The Oregon Stag", volume 7, No. 2, purchased by the state agent from U.S. Marketing, Inc. This publication is wholly

prurient in a morbid sense seemingly intending to exploit sex as a lustful experience.

State's exhibit No. 25, a paper magazine entitle "The Oregon Stag" Volume 8, No. 4 is the same publication as State's exhibit No. 22. It further tells the erotic tale of how a 13 year old girl decides to become mostly lesbian after an experience with an older 18 year old neighbor girl. This represents the exploitation of children in pornography. This publication promotes lust as distinguished from love as a sexual experience, and it appeals to the prurient interest as a morbid interest; accordingly, it is obscene under the test of the Idaho law.

State's exhibit No. 27 was purchased by a state agent from U.S. Marketing, Inc. It is a magazine type publication in the vernacular described as a school for cunnilingus. In erotic picture and story, it

tells of a father who visits his youngster's teacher to discuss her class in sex education, and gets an education himself complete with all forms of a pictorial demonstration, orally and analy. This material is obscene.

State's exhibit No. 35 was purchased by a state agent from Niks and Naks on March 4, 1977. It is a magazine entitle "Little Girls". The exhibit is essentially lewd photos of young girls ranging in age from about four years to sixteen years. Some of textual materials erotically describe the sexual feelings of young girls as they enter into puberty. Words on the cover refer in vernacular to young vagina ready for cunnilingus. This document is "child pornography". Female genital of young girls is lewdly displayed in sexually exciting positions. The Court feels that this publication is obscene under Idaho law.

State's exhibit No. 36 was purchased

from Niks and Naks on November 4, 1977 by a state agent. It is a pulp paper magazine called "Throb". It depicts lewd pictorial and printed material showing sex acts naturally by mouth and with dildos. Short stories are concerned with the husband who is terminated on his job so he goes pimping for his willing wife, an incestuous relationship by a son with his mother, a lady who prefers sexual excitement by use of dildoes and a one male three female orgy. This document meets all of the tests under Idaho law for obscenity without redeeming factors. It is therefore obscene.

State's exhibit 39 is a magazine purchased from Niks and Naks by a state agent on May 9, 1977 entitled "Finger Poppin". It is concerned with masturbation by females using fingers, dildos and electrical vibrating dildos. One article describes a cocktail party in which those attending

drop off all of their clothing as they enter the door. Cocktails are consumed in the nude. After cocktails, the girls play a party game consisting of a contest to see who can achieve the most orgasms with the use of a vibrating dildo. All lie on the floor in a circle using a dildo, while a man lying next to the competing girl keeps score by counting the number of contractions of a sphincter muscle at the mouth of the anus, reached by a finger inserted into the rectum. The other articles in the magazine deal with aspects of female masturbation by dildo and manually. This publication constitutes obscenity under State law.

State's exhibit 40 was purchased from Niks and Naks by a State agent on May 9, 1977. There is no cover on the item. It is a pulp paper magazine depicting sex acts normally and per oros and female

masturbation with dildos. Pictures are accompanied by story material describing sexual conduct designed to sexually arouse. The exhibit is obscene under Idaho law.

It shall be noted that many of these publications print classified advertisement sections which provide readers with information on how they can reach suppliers, and sex partners. The ads deal chiefly with arranging contacts between people interested in satisfying their mutual fetishes and perversions, such as "enslavement", "bondage" and "humiliation". The ads attempt to assist those who wish to be defecated or urinated upon ("water games"), beaten (Sado-masochism, flagellation), to indulge in leather and rubber fetishes, or to be indluged in infantilism, etc.

The defense has submitted in evidence examples of materials held not to be

obscene in prior trials in Idaho. It appears these materials Defendant's exhibits D and E, were in evidence in the case prior to the time Idaho passed its new obscenity law in 1976. It would appear standards today are considerably different since the word "utterly" has been removed from the law in looking at any particular item of alleged obscenity for its literary, scientific, artistic or political value, if any.

In going over all of these materials and in searching for scientific, political or other value, the Court has had in mind the testimony of the defense expert in which he indicated in effect that pornographic stores are the poor man's treatment centers for people who suffer from sexual dysfunctions or inhibitions. It is in the record that in this community there is a mental health center where the poor

person or anyone else can obtain treatment or advice. Sexually explicit films, magazines and other materials are available as an aid to treatment. Likewise available are electrical vibrators and other implements which can be used to promote domestic stability where espoused persons are having problems with sex in marriage.

It seems to the Court that in the process of finding the community standard applicable in deciding what appeal to the prurient interest in sex as a morbid interest, the fact finder is entitled to consider the nature and character of the community from a moralistic viewpoint. The kind and type of environment in which people want to live and raise families is important. People are greatly concerned with the moral security of their children and themselves and are also concerned with the protection and security of their properties

and homes. Because of this concern, certain other state interests have appeared designed to allay these concerns of people as to the quality of their lives and their environment. Accordingly, the state has a significant interest in maintaining its cities and neighborhoods as pleasant and attractive places for families to live and work. When materials which are offensive to most people are readily available this interest is impaired. It has been noted by the U.S. Supreme Court in Young v. American, Mini-Theaters Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, that a factual basis exists linking "adult" theaters and bookstores to serious degeneration of neighborhoods and communities, resulting in higher incidence of crime (notably prostitution), a significant increase in so called "undesirables" and transients and, of course, reduction of surrounding property values.

The Supreme Court in Young upheld restrictions and regulation of these establishments, even when constitutionally protected materials were involved, in the interest of promoting these very values. "(T)he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." The same interests have been given recognition in this circuit in Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976) though different freedom of speech interests were competing with them in that case.

In such circumstances, the Court believes the legislature is clearly within the scope of its authority in enacting censorship legislation on obscenity. In this light, the Court cannot accept the proposed idea that masturbation parlors posing as adult bookstores can be justified under the law in this community or under its

community standards, as therapy centers for the sexually dysfunctional or inhibited.

In working with the materials admitted into evidence, the Court has found that the Court system with its fact finding judges and juries can in any properly tried case act as a censorship body. Determining what materials are obscene or are not obscene is not particularly difficult under the standards laid down by the United States Supreme Court and the Idaho Legislature.

This Court is convinced that the magistrates and juries in this community and in this state will have little difficulty in determining whether materials are obscene when prosecutions are made under the applicable criminal laws.

This trial has been trifurcated. Remaining now is the application of sanctions in reference to those materials which have been found herein to be obscene. The Court

sets the time for trial on sanctions at 9:00 o'clock A.M., on January 30, 1978.

Prior to that time, the state is asked to provide a form of partial judgment for the Court to sign which expresses this opinion of the Court.

It is so ORDERED.

Dated this 16th day of January, 1978.

W.E. SMITH
District Judge.

EXHIBIT A

G L O S S A R Y

BESTIALITY: Sexual relations between human and animal.

BUGGERY: Sodomy.

CUNNILINGUS: Sexual activity in which the mouth and tongue are to stimulate the female genitals.

DILDO: An object serving as a penis substitute for vaginal insertion.

FELLATIO: Sexual stimulation of the penis by oral contact.

FLAGELLANTISM: A masochistic or sadistic act in which one or both participants derive stimulation, usually erotic, from whipping or being whipped.

HOMOSEXUALITY: Sexual attraction or relationship between members of the same sex.

INFANTILISM: Retention of childish physical mental or emotional qualities in adult life, especially failure to attain sexual maturity.

LOOP: A pornographic motion picture film played over and over again on submission of coins in an arcade.

MASOCHISM: Pleasure derived from physical or psychological pain inflicted either by oneself or by others.

MASTURBATION: Erotic stimulation of the genital organs

commonly resulting in orgasm and achieved by manual or other bodily contact exclusive of sexual intercourse, by instrumental manipulation, occasionally by sexual fantasies, or by various combination of these agencies.

NARCISSISM: Love of or sexual desire for ones own body.

PANDER: (as used in this decision) Someone who caters to or exploits the weaknesses of others.

PANDERIUS: To provide gratification for others.

PEDERASTY: Homosexual anal intercourse between man and boy.

PEDOPHILIA:	A sexual deviation involving the use of children for sexual purposes.
SADISM:	Pleasure derived from inflicting physical or psychological pain or abuse on others.
SODOMY:	Anal intercourse.
VOYEURISM:	Sexually motivated and often compulsive interest in watching or looking at others particularily at genitals.

F O O T N O T E S

1. Memorandum Decision and Order filed in these cases July 15, 1977, citing Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 87 L.Ed.2d 419; Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d, 1498. Re nuisance abatement: People ex rel. Busch v. Projection Room Theatre (Cal S. Ct. 1976) 130 Cal.Rptr. 378, 550 P.2d 600.

2. Roth v. United States, supra note 1.

3. For example the state may not regulate the mere possession of obscene materials in the home, or the purely private viewing or reading of such materials, when this activity is carried on in the home or some other purely private place. The protection, however, is not directly derived from

First Amendment protections of speech or press. The interest protected is one of privacy. The state intrusion which is constitutionally prohibited in this regard is the intrusion into a citizen's personal library, his home, and his private thoughts. It is not a corollary of the right of businesses to produce and diseminate such materials. It is instead a product of the "zone of privacy" concept which the Supreme Court has developed as to private thoughts and consciences of each citizen. The existence of this protection has uniformly been held to confer no rights whatsoever upon commercial dealers in obscene materials. Stanley v. Georgia, 394 U.S. 557 at 564, 89 S.Ct. 1243 at 1247 (1969); Paris Adult Theater I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d

446, (1973); U.S. v. 12, 200 ft. Rolls of Film, 413 U.S. 123, 93 S.Ct. 2665 37 L.Ed.2d 500.

4. See note 1 supra, for citation on Roth Alberts was the companion case decided in the same opinion.

5. See e.g.

Cusack v. Teitel Film Corp. (Ill., 1967) 230 N.E. 2d 241

City of Chicago v. Universal Pub. and Dist. Corp. (Ill., 1966) 215 N.E. 2d 251

State v. LeWitt (Conn. App., 1966) 222 A 2d 579.

Haldeman v. U.S. (10th Cir., 1965) 340 F. 2d 59.

People v. Kimmel (Ill. 1966) 220 N.E. 2d 203

U.S. v. Grover (5th Cir., 1972) 475 Fed Rptr. 2d 550, 558 n. 11 cites many cases showing where prior to

Miller v. California, supra, many heavily pornographic depictions have been held not to be obscene.

6. Anno: 5 ALR 3d 1158 - 1195 Supplement 1977 §10 p. 120.

7. Supra §10.6 and cases cited therein.

8. Holmes appears in several of the films although he is not specifically mentioned in the opinion with respect to each film since this opinion is not designed to advertize him. However, the use of such specially physically qualified actors serves to illustrate the nature of the films and the emphasis which the films place on aspects which are, generally speaking, independant of clinical, artistic, or social values.

9. Idaho Code §16-1802, 16-1602, 16-2002, 18-6101, 18-6607.

10. See Kaplan v. California 413 U.S. 115, 37 L.Ed.2d 492, 935 of 2680 (1973).

Appendix G

(Reference: Amicus Curiae Brief at pg. 9)

Idaho District Court's Memorandum Decision and Order filed July 28, 1978 in Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc., et al., Civil No. 60874 and Idaho ex rel. Kidwell et al. v. Niks Adult Bookstore et al., Civil No. 60875.

..... G-1 thru G-14

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

State of Idaho, et al Plaintiff,	Case No. 60874
vs.	
U.S. Marketing, et al Defendant,	MEMORANDUM DECISION AND ORDER
State of Idaho, et al Plaintiff,	Case No. 60875
vs.	Filed: July 28, 1978
Niks & Naks, et al Defendant,	

The question currently before the court concerns the award of attorney's fees and costs of investigation pursuant to I.C. §52-415. Under that section the "costs of abatement" of any moral nuisance are recoverable by the state in actions such as the one before the court. Such costs include:

1) the costs of investigation 2) court costs 3) reasonable attorney's fees and

4) printing costs incurred in the lawsuit.

In the case at bar, the state has succeeded in abating several "moral nuisances." I.C. §52-104 (C) and (E) declare obscene films and publications to be moral nuisances. Upon finding that the films and some of the publications introduced into evidence are obscene, and upon ordering that these films may no longer be sold or possessed by the defendants these nuisances have been successfully abated. It follows that the state has prevailed in these aspects of its abatement action, and the statute requires that the state be awarded its fees and costs. But the matter does not end here. It has also been determined that at least some of the publications sold by defendants are protected by the First Amendment of the United States Constitution. It, therefore follows that some of the costs incurred by the state in this action were

incurred in an attempt to curtail the exercise of defendant's First Amendment rights.

In an action such as this, the vagueness of the constitutional standard (especially where the guidelines have not yet been judicially established) and the difficulty of applying the standard to individual items, will inevitably lead to court action involving both protected and unprotected films and publications. In fact without a mixture of constitutionally obscene and non-obscene material before the court no effective guidelines could emerge from the adjudication. The time, efforts and funds of the state must be expended partly toward constitutionally protected activity and partly toward the abatement of "nuisances" not entitled to such protection.

I.C. §52-415 seeks to reimburse the

state for successful actions to abate such nuisances by the imposition of a "civil penalty". The nature of this "penalty" however goes beyond the purpose of reimbursement. Its purpose when read within the context of the entire chapter (Title 52 Chapter 4) is to destroy any opportunity for profit or economic gain which might otherwise be available to one selling obscene matter. In short, the section awarding costs operates precisely as its title indicates i.e. as a penalty imposed to discourage the activity involved. While this penalty is distinguishable from a criminal fine, its nature and purpose are similar. The statute is mandatory and one-sided in that no similar provision is made for the recovery of costs, attorney's fees or "investigative costs" incurred by a defendant in such an action brought by the state. It is clearly <u>not</u> like I.C. §12-121

which seeks to allow a court to achieve an equitable distribution of the costs of litigation by exercising its discretionary powers. Instead, it is an economic burden imposed upon businesses dealing in sexually explicit materials when the materials involved are judged to be obscene. Because the statute is penal in nature, it should be strictly construed, and enforced only to the extent that the state proves its costs and fees to be directly traceable to the successful abatement of a particular nuisance. This is the only construction of the provision which will protect a defendant from paying a penalty for engaging in constitutionally protected activity, that is, the publishing and sale of non-obscene literature and other media. If the statute is construed to include all of the costs of any such action patent inequities would result. It would be possible for

a bookseller who sold a single obscene book to pay the costs of a huge litigation effort aimed at interfering with the legitimate business activities of the bookseller, on the strength of the state's token success. Such a penalty would be disproportionate to the harm which the state seeks to remedy.

Applying this reasoning to the facts before the court, this court must conclude that the defendants are liable for any costs which can be traced to the abatement of any of the items declared to be obscene in this courts' Memorandum Decision of January 16, 1978.

This conclusion causes some mechanical difficulties in isolating the time and money expended for any particular item. Some legal proceedings and research must necessarily apply to several or many different items. In such circumstances some proration of costs must be permitted in

order to allow any costs to be determined. The proration must, however, be rationally related to the task and the items involved. When percentages are assigned arbitrarily to work done on some particular phase of the action, proof of such costs falls short of the specificity required. For example, time and expense traceable directly to the trial is clearly spent on items introduced into evidence at the trial and may be prorated and recovered in proportion to the percentage of the items tried which are ultimately found to be obscene. However, when hours are recorded under some more general category, and arbitrary decision to attribute some percentage of that time to the items found to be obscene lacks the specificity which the statute by its nature requires. The state's attorney's have presented lists of hours and expenses as well as testimony concerning the time spent and

costs incurred in this action. Unfortunately, the records kept by the state are not specific enough to isolate the costs attributable to the items successfully attacked by them. While the attorneys for the state have undoubtedly acted in good faith in allocating the percentages of time and money spent to the items involved, they admitted on cross examination that they had no specific personal recollection of the precise items involved in the various task undertaken. The allocation of time represented in the state's account, while undertaken in good faith, appears to this court to be based upon insufficient memory and inadequate records. Under the circumstances, these assignments are, generally speaking, much too arbitrary to support the imposition of the penalty accordance with the state's figures.

Some items, however, may be isolated

from the evidence before the court with sufficient certainty to allow an award of attorney's fees. As noted above, all of the time directly connected with the trial can be attributed to the items tried, and these costs may be assessed according to a simple pro rate formula. The state may assess all hours devoted to the trial, reduced by the percentage of items tried which were not found to be obscene.

In reviewing the record the court finds 45.5 hours of trial related time recorded by Mr. Berry and 19 hours recorded by Mr. Nielsen.

The state has argued that attorney's fees should be awarded at the rate which a private attorney would charge. This court cannot agree. The penalty statute provides for recovery of various costs in addition to attorney's fees. The rates charged by private attorneys are designed to include

various expenses which are not directly billed such as secretarial time, and investigative costs. Since these items are treated separately in the state's accounting, it would be duplicitous to award the state attorney's fees at the private rate.

Accordingly the salaries of the attorney's involved, broken down to an hourly rate, assuming forty hours per week, should be the standard used to determine the amount awarded in attorney's fees. The record in this case does not allow an accurate apportionment of investigative or secretarial costs according to the items declared to be obscene. Therefore no such costs will be assessed against the defendants.

The Court is aware that the state's attorney's could not have foreseen the course of this litigation at the time that the first records were being kept. In the future, however, this decision may serve

as a guide to improvising a method of recording costs and time as a function of particular aspects of the case and the particular nuisances to be abated. Such a system need not be significantly more burdensome than a private attorney's time keeping methods and if properly followed would eliminate the problems of proof encountered in this first lawsuit.

The plaintiff has also allocated the time spent between the two defendants. Trial time was arbitrarily evenly divided between the two defendants. Again the court must emphasize that the costs of abatement of a nuisance must be reasonably related to the particular nuisance involved. Consequently the amount a particular defendant's penalty must represent that defendant's contribution to the nuisances abated. Thus in allocating trial time the fees must be proportionate to the items

declared to be obscene. Of the 21 items which were the subject of the suit U.S. Marketing was distributing 10 of them while Niks & Naks was distributing 11. The number of items declared obscene, can be expressed as a fraction of the total number of items tried (31) as 10/31 for U.S. Marketing and 11/31 for Niks & Naks.

To compute the proper allocating of fees incurred in the trial related hours, each defendant must pay for the portion of the fees which is represented by the number of nuisances for which it is liable. Thus U.S. Marketing must pay 10/31 of each attorney's hourly cost and Niks & Naks must pay 11/31. This formula results in the following table of fees:

U.S. Marketing, Inc.

Total trial related hours for Arthur Berry: 91 hours times 10/31 equals 29.35 hours at $6.93/hour equals

$203.43. For Gordon Nielsen: 38 hours times 10/31 equals 12.26 hours at $12.70/hour equals $155.68 making the total fees due from U.S. Marketing $359.11 (three-hundred, fifty-nine dollars and eleven cents).

Niks & Naks, Inc.

For Arthur Berry 91 hours times 11/31 equals 32.29 hours at $6.93/hour equals $223.77 and for Gordon Nielsen 38 hours times 11/31 equals 13.48 hours at 12.70/hour equals $171.25 for a total due from Niks & Naks, Inc., of $395.02 (three-hundred and ninety-five dollars and two cents).

While this method of computation is complex, it is simplified considerably by the keeping of accurate records in future cases, and appears to be the only way of accurately tying the costs of abatement to the nuisances abated, and the only way to avoid

the imposition of a penalty upon a defendant's constitutionally protected activities.

The defendant U.S. Marketing, Inc., will pay the State of Idaho $359.11 in attorney's fees and the defendant Niks & Naks will pay the State of Idaho $395.02 in attorney's fees pursuant to the provisions of I.C. § 52-415.

It is so ORDERED.

Dated this 28th day of July, 1978.

W. E. Smith
District Judge.